Supreme Court, U.S.
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No. 031147 FEB 5 2004

In The
Supreme Court of the United States

DAVID M. ROEDER, ET AL.,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress is required to satisfy a "clear statement" requirement before it may abrogate an unratified executive agreement.

LIST OF PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), petitioners state that the parties to the proceedings in the court of appeals were:

David M. Roeder,
Charles W. Scott,
Don A. Sharer,
Barbara B. Rosen, and
Ariana B. Rosen, individually and on behalf of a proposed class of similarly situated persons

The Islamic Republic of Iran
The Ministry of Foreign Affairs

The United States of America

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PETITION FOR WRIT OF CERTIORARI

David M. Roeder, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The Court of Appeals' opinion (App. 1a-19a) is reported at 333 F.3d 228. The District Court's opinion (App. 20a-110a) is reported at 195 F. Supp.2d 140.

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 2003. The court denied the petition for rehearing and rehearing en banc (App. 111a-112a) on November 7, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Appendix D (App. 113a-120a) contains the relevant provisions of the following statutes: Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 113 Stat. 1501 (codified at 28 U.S.C. § 1605(a)(7)); Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, § 589, 110 Stat. 3009-172 (codified at § 1605 note); Department of Defense and Emergency Supplemental Appropriations For Recovery From and Response to Terrorist Attacks on the United States Act, Pub. L. No.

107-117, 115 Stat. 2230 (2002); Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 2002 Public Law No. 107-77 (2001); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464; Treasury Department Appropriations Act of 1998, Pub. L. No. 105-277, Title I, § 117(d) (codified in 28 U.S.C. § 1610 note).

STATEMENT

In this case, the D.C. Circuit held that Congress may not abrogate an unratified executive agreement unless the legislature acts with a "plain statement" of its intent. The D.C. Circuit's decision conflicts with *Whitney v. Robertson*, 124 U.S. 190 (1888), and with rulings in other circuits that have faithfully adhered to *Whitney*. Further, the Court of Appeals' decision presents grave separation of powers concerns because it effectively subordinates statutes enacted by Congress and signed by the President to unilateral executive agreements and administrative regulations. This Court's review is urgently needed.

A. Background.

This case involves claims for compensation by U.S. diplomats and other Americans taken hostage by the Iranian government at the U.S. Embassy in Tehran in 1979 and held for 444 days under appalling conditions. Plaintiffs' ordeal began on November 4, 1979, when hundreds of alleged students swarmed over the walls of the U.S. Embassy. The Embassy's Security Officer, recognizing members of the Iranian Revolutionary Guard among the crowd, sought their help in restraining the

growing mob, but they promptly took him captive at gunpoint. The Iranian soldiers then marched the American Security Officer to the top floor of the Embassy's Chancery building and threatened to murder him unless the American diplomats barricaded within opened the doors and surrendered.

The surrounded diplomats were in telephonic communication with the senior American diplomat, the Charge D'Affairs, who was then visiting the Iranian Ministry of Foreign Affairs, ironically, to discuss inadequate security protection for the Embassy grounds. After cautioning the besieged diplomats over the telephone to avoid bloodshed, the American Charge demanded that the Iranian government take immediate action to rescue the American diplomats. Instead of rescuing the besieged diplomats, the Foreign Ministry took the American Charge and his aides captive on the premises of the Foreign Ministry.

Meanwhile, back at the Chancery Building, the American diplomats reluctantly opened the doors to the Iranian Revolutionary Guards to prevent the summary execution of the Embassy's Security Officer. Thus began plaintiffs' 444-day ordeal as hostages of the defendants Islamic Government of Iran and the Ministry of Foreign Affairs. Many of the hostages were taken to Komiteh Prison, a well known government prison near Tehran, and to Evin Prison, another government facility. On December 22, 1980, Iran informed the United States that, unless payment of $24 billion was made, the hostages would be put on trial as spies. Pl. Ex. 22 (App. 121a)

The government of Iran was a participant in, and sponsor of, the Embassy takeover from the first day, as evidenced by: (i) the involvement of Iranian army personnel

in the takeover; (ii) the seizure and detention of the highest embassy official (the Charge) by the Iranian Foreign Ministry at its offices; (iii) the immediate public endorsement of the takeover by the Ayatollah Khomeini; and (iv) the immediate involvement of his son in the takeover. The imprisonment of the hostages in government prisons and the negotiating demands of Iranian government leaders further confirmed the complete involvement of the Iranian government throughout this affair.

Ultimately, in January 1981, the Iranian government agreed to release the hostages in exchange for $7.9 billion. To the very end, however, the government of Iran made its intention clear that it would free the hostages only upon the satisfaction of its financial demands. Pl. Ex. 23 (App. 122a). On January 20, 1981, the hostages were released, but only after President Carter had formally left office.

B. The Algiers Accords.

The terms for the hostages' release were part of an executive agreement known as the Algiers Accords. The Accords were never submitted to or ratified by the Senate and thus never became a treaty obligation of the United States.

The Algiers Accords, 20 I.L.M. 223, 227 (1981), state in relevant part:

> [t]he United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this declaration related

> to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran.

The Algiers Accords were implemented through administrative regulations and executive orders promulgated pursuant to the International Emergency Economic Powers Act, 50 U.S.C. § 1701. Exec. Order No. 12283, 46 Fed. Reg. 7927 (1981), states in relevant part:

> 1-101. The Secretary of the Treasury shall promulgate regulations: (a) prohibiting any person subject to U.S. jurisdiction from prosecuting in any court within the United States or elsewhere any claim against the Government of Iran arising out of events occurring before the date of this Order relating to (1) the seizure of the hostages on November 4, 1979, (2) their subsequent detention, (3) injury to United States property or property of United States nationals within the United States Embassy compound in Tehran after November 3, 1979, or (4) injury to United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran . . .
>
> 1-102. The Attorney General of the United States is authorized and directed, immediately upon the issuance of regulations in accordance with Section 1-101, to take all appropriate measures to

> notify all appropriate courts of the existence of this Order and implementing regulations and the resulting termination of litigation.

A Treasury regulation prohibited the hostages "from prosecuting in any court within the United States . . . any claim against the Government of Iran." 31 C.F.R. § 535.216(a).

C. Subsequent Legislation.

More than a decade after the Algiers Accords were signed, Congress enacted a network of statutes evidencing its intent to authorize lawsuits against foreign states that sponsor terrorism. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 113 Stat. 1501 (codified at 28 U.S.C. § 1605(a)(7)), established a specific exception to the Foreign Sovereign Immunities Act ("FSIA") for acts of state-sponsored terrorism. The legislative history cited the need to respond to "the hostage takings of Americans in the Middle East." H.R. Rep. 104-383, at 41 (1995). The Antiterrorism Act adopted the definition of hostage taking set forth in the International Convention Against Hostage Taking which was promulgated in December 1979 after these very plaintiffs were taken hostage. *See* 28 U.S.C. § 1605(e)(2); *Price v. Socialist People's Libyan Arab Jamahirya*, 294 F.3d 82, 94 (D.C. Cir. 2002).[1] Unlike the Algiers Accords, the International

[1] Even before the International Convention, hostage taking was prohibited under the terms of the Geneva Convention. *Kadic v. Karadzic*, 70 F.3d 232, 242-243 (2d Cir. 1995).

Convention Against Hostage Taking was ratified by the Senate.

Later in 1996, Congress amended the Antiterrorism Act in an appropriations rider entitled Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, § 589, 110 Stat. 3009-172 (codified at § 1605 note) ("Flatow Amendment"). The Flatow Amendment provides:

> An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under [28 U.S.C. § 1605(a)(7)] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in [§ 1605(a)(7)].

28 U.S.C. § 1605 note. The sponsor of the amendment understood that, "'in order for the exception for immunity to have the desired deterrent effect, the potential civil liability for foreign states which commit and sponsor acts of terrorism would have to be substantial.'" *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 12 (D.D.C. 1998) (citation omitted).

In 1998, Congress enacted legislation to authorize the satisfaction of judgments under § 1605(a)(7) from the blocked assets of the judgment debtor states. Treasury Department Appropriations Act of 1998, Pub. L. No. 105-277, Title I, § 117(d) (codified in 28 U.S.C. § 1610 note). In this same Act, Congress provided that foreign states would

be liable for punitive damages in actions brought pursuant to § 1605(a)(7). Pub. L. No. 105-277, 112 Stat. 2681-491 (1998).

In 2000, Congress enacted supplementary legislation requiring the Treasury Department to satisfy judgments in identified lawsuits against foreign states under the Antiterrorism Act, including suits against Iran such as in the *Flatow* case. Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386 (the "2000 Act"). Significantly, the 2000 Act subrogates the United States to the claims of any plaintiff whose judgment against Iran is paid under the Antiterrorism Act and directs the President to "pursue these subrogated rights as claims of the United States." Pub. L. No. 106-386, § 2002(b)(c) ("Upon payment, . . . the United States shall be fully subrogated, to the extent of the payments, to all rights of the person paid . . . against the foreign state"). In other words, in the 2000 Act, Congress mandated that the claims of these terror victims against Iran, if paid by the United States, became "claims of the United States." *See, e.g., Flatow v. Islamic Republic of Iran*, 305 F.3d 1249, 1251 (D.C. Cir. 2002) (describing payment of one such judgment against Iran by Treasury Department). According to the corresponding Conference Report: "[in] the view of the Committee, it is generally in the national interest of the United States to make foreign state sponsors of terrorism pay court-awarded damages to American victims, so neither the Foreign Sovereign Immunities Act nor any other law will stand in the way of justice." H.R. Conf. Rep. No. 939, 106th Cong. 2d Sess. 118 (2000). In this same Act, Congress repealed the earlier amendment to 28 U.S.C. § 1606 that had allowed punitive damages against foreign states under § 1605(a)(7).

In November 2001, the Treasury Department promulgated regulations implementing the 2000 Act by establishing the procedures by which a judgment creditor against Iran can obtain payment of his or her judgment from the Treasury Department. 65 Fed. Reg. 70382-85 ("Payments to Persons Who Hold Certain Categories of Judgments Against Cuba or Iran") (November 22, 2000). In these regulations, the Treasury Department identified the judgments that are subject to satisfaction under the 2000 Act as "claims brought under 28 U.S.C. § 1605(a)(7)." 65 Fed. Reg. 70383-84, Part 2(b), 2(d)(1), 2(e)(1), 2(f).

D. This Lawsuit and the District Court's Decision.

On December 29, 2000, Plaintiffs sued the Islamic Republic of Iran under the Antiterrorism Act of 1996, 28 U.S.C. § 1605(a)(7), and applicable law of the District of Columbia. The lawsuit was filed as a proposed class action on behalf of the hostages and their spouses and children at the time of their captivity. On February 23, 2001, the Complaint was amended to add the Iranian Ministry of Foreign Affairs as a defendant.

Throughout the proceedings below, neither Defendant appeared even though both Defendants were properly served with process in accordance with 28 U.S.C. § 1608. The Court formally entered a default judgment as to liability on August 17, 2001 and scheduled a trial for damages to begin October 15, 2001.

Late on the afternoon of October 12, 2001, the last court day prior to the scheduled start of trial, the State Department, appearing through the Justice Department, notified the District Court that the United States would seek to intervene as a defendant to prohibit the continued

prosecution of the suit, and the United States did so later that evening by filing an emergency motion to intervene, a motion pursuant to Fed. R. Civ. P. 60 to vacate the earlier default judgment, and a motion to dismiss the complaint.

On November 15, 2001 – thirty-two days after the State Department filed its motions to intervene and to attack the legal sufficiency of the Complaint herein – Congress responded to the State Department's actions by enacting Section 626(c) of the 2002 Appropriations Act for the Departments of Justice, Commerce, and Treasury, Pub. L. No. 107-77, 115 Stat. 748 (2001), which provides:

> Amend 28 U.S.C. § 1605(a)(7)(A) by inserting at the end, and before the semicolon, the following: "or the act is related to Case Number 1:00CV03110 (ESG) [sic] in the United States District Court for District of Columbia."

The Appropriations Act thus amended 28 U.S.C. § 1605(a)(7)(A) by explicitly waiving sovereign immunity and affirming civil liability for the hostage taking in the case at bar. The Conference Committee Report explained:

> Subsection (c) quashes the State Department's motion to vacate the judgment obtained by plaintiffs in Case Number 1:00CV03110 (ESG) [sic] in the United States District Court for the District of Columbia. Consistent with current law, subsection (c) does not require the United States Government to make any payments to satisfy the judgment. [The House bill did not contain a provision on this matter.]

H.R. Conf. Rep. No. 278, 107th Cong., 1st Sess. 170 (2001). On November 28, 2001, President Bush signed this appropriations bill into law.

Notwithstanding the enactment of Subsection 626(c), the government persisted in its effort to intervene as a defendant to procure dismissal of the claims being made against the Iranian defendants. According to the government, Subsection 626(c) operated only to confer jurisdiction on the court to hear Plaintiffs' claims but not to award any judicial relief. At a hearing on the government's motions on December 13, 2001, the District Court admitted that it "was surprised by the Congressional action," and recognized that "Congress is following this case," and that the legislation was "focusing on these plaintiffs and no one else." The Court repeatedly "commend[ed]" Congress for its action in passing Subsection 626(c). In response to the government's position, the court observed:

- "What did Congress intend? To give the plaintiffs false hopes? Congress did not intend that."
- "What is it [Congress] gave them, though? A right to maintain a lawsuit that goes nowhere? Congress didn't intend that."
- "And Congress must have had an intent in mind by doing so; to pave the way for recovery. Why isn't that just crystal-clear from Congressional action? Because I have to look, in weighing all these statutes and legislative acts from Congress, executive orders, Treasury regulations, I mean, they all lead to a certain result. The Flatow Amendment, the Antiterrorism Act, everything is whittling away at the sovereign immunity of Iran since the Algiers Accords."

During the hearing, the District Court noted that Congress could take an "additional step" or "further

action" to make its intentions plain, thereby "providing this Court with some clear guidance" regarding the abrogation of the Algiers Accords.

Only four legislative days later, Congress responded to the District Court's invitation. On the last day of the legislative session, Congress enacted legislation to correct an erroneous reference and to re-affirm its intention that this particular case be permitted to proceed to judgment regardless of the Algiers Accords. On December 20, 2001, Congress passed, and on January 10, 2002, the President signed into law, the Department of Defense and Emergency Supplemental Appropriations Act, Pub. L. No. 107-117, 115 Stat. 2230. Section 208 of this Act provides that "Section 626(c) of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 2002 (Public Law No. 107-77) is amended by striking '1:00CV03110 (ESG)' and inserting '1:00CV03110 (EGS).'"

The accompanying Conference Report explained:

> The language included in Section 626(c) of Public Law No. 107-77 quashed the Department of State's motion to vacate the judgment obtained by plaintiffs in Case Number 1:00CV-3110 (EGS) and reaffirmed the validity of this claim and its retroactive application. Nevertheless, the Department of State continued to argue that the judgment obtained in Case Number 1:00CV-3110 (EGS) should be vacated after Public Law No. 107-77 was enacted. The provision included in Section 626(c) of Public Law No. 107-77 acknowledges that, *notwithstanding any other authority*, the American citizens who were taken hostage by the Islamic Republic of Iran in 1979 have a claim against Iran under the Antiterrorism Act of 1996

> and the provision specifically allows the judgment to stand for purposes of award damages consistent with Section 2002 of the Victims of Terrorism Act of 2000 (Public Law No. 106-386, 114 Stat. 1541).

H.R. Conf. Rep. 107-350 at 422-23 (2001) (emphasis added).

At a status conference in January 2002, the district court observed that Congress had directly responded to the concerns raised by the court at the earlier hearing in December 2001:

> "Well, it may be post hoc, but during the last hearing I was sharing a lot of thoughts about whether Congress had spoken clearly and articulated its intent to do something that would impact the Algiers Accords, and Congress apparently responded to some of the questions I raised and took further action to clarify its intent for its actions in November."

While noting that Congress had not expressly referred to the "Algiers Accords" by name, the court nevertheless observed that "the language was 'notwithstanding any other authority,' which would include the Algiers Accords." At a final status conference on February 20, 2002, the court acknowledged that it had "shared some thoughts . . . and Congress responded to the questions that this Court raised." The court remarked:

- "How could there be any speculation if Congress said clearly notwithstanding any other authority? It didn't say notwithstanding any other authority with the exception of the Algiers Accords. It said, any other authority. How could there be any doubt whatsoever as

to what Congress intended by the careful choice of that language."

- "Why would the Congress create a vehicle for plaintiffs to maintain a lawsuit that at the same time denied any possibility of relief? . . . Wouldn't that produce the absurd result that federal judges strive to prevent?"

Despite these comments, on April 18, 2002, the District Court granted the Government's motion to intervene and dismissed Plaintiffs' claims against the Iranian defendants. App. 109a-110a. The court held that, although the Flatow Amendment created a federal claim against an "official, employee, or agents" of a foreign state for terrorism, it did not subject foreign states to liability under the Antiterrorism Act. App. 80a-81a. As to the recent acts of Congress, the Court concluded: "[R]ather than proceed with the requisite clarity and assurance of purpose needed when legislating in the realm of foreign affairs, Congress chose to enact two provisions about which only one thing is clear: Congress's intent to interfere with ongoing litigation." *Id.* at 23a.

E. The D.C. Circuit's Decision.

The D.C. Circuit affirmed on the basis of a clear statement rule it created for executive agreements. Borrowing from constitutional principles such as the separation of powers and sovereign immunity, the Court of Appeals explained that "[c]ourts have insisted on clear statements from Congress in other contexts. These include a waiver of federal sovereign immunity, retroactivity of statutes, repeal of habeas jurisdiction, waiver of Eleventh Amendment immunity, and a significant alteration in the balance of power between Congress and the President."

App. 18a. Evidently believing that the issue of legislative abrogation of an executive agreement involved questions of similar magnitude, the court opined that "neither a treaty nor an executive agreement will be considered 'abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.'" *Id.* at 17a (quoting *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (further citation omitted)).

The Court of Appeals then held that there was no "clear statement" from Congress to abrogate the Algiers Accords. The Court acknowledged that the legislative history of Section 626(c) contained "the type of language that might abrogate an executive agreement – if the statement had been enacted." App. 16a. Indeed, the Court raised the question "whether Congress may dictate the outcome of a particular judicial proceeding." *Id.* at 15a-16a. But ultimately the court found – somewhat paradoxically given the expressed concern that Congress was attempting to dictate the outcome of a judicial proceeding – that there was "no clear expression in anything Congress enacted abrogating the Algiers Accords." *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

A. THE D.C. CIRCUIT'S HOLDING CONFLICTS WITH DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER CIRCUITS.

Certiorari is warranted because the D.C. Circuit's holding that Congress may not abrogate an unratified executive agreement unless it satisfies a "clear statement"

rule conflicts with precedent in this Court and in other circuits.

This Court has held that Congress can abrogate an executive agreement without making a "clear statement" of an intent to abrogate and without even identifying the executive agreement in question. In *Whitney v. Robertson*, 124 U.S. 190, 195 (1888), for example, this Court interpreted an "act of congress" that was of "general application," which was challenged on the ground that it contravened the specific language of an earlier treaty. *Id.* at 193. *Whitney* upheld the later general statute against a challenge that it violated an earlier treaty, holding that "*it is wholly immaterial to inquire whether by the act assailed [Congress] has departed from the treaty or not, or whether such departure was by accident or design, and, if the latter, whether the reasons were good or bad.*" *Id.* at 195 (emphasis added). This Court adopted no rule requiring an explicit congressional declaration of abrogation. Rather, this Court opined that "[t]he duty of the courts is to construe and give effect to the latest expression of the sovereign will" under the doctrine of *lex posterior*. *Id.* Accord, *Breard v. Greene*, 523 U.S. 371, 376 (1998) (citing *Whitney*).

The D.C. Circuit's decision also conflicts with decisions in other circuits faithfully following *Whitney*. In *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116 (2d Cir.), *cert. denied*, 531 U.S. 918 (2000), for example, the Second Circuit held that "Congress is not required to investigate the array of international agreements that arguably provide some protection that it wishes to annul and then assemble a check-list reciting each one." *Id.* at 124. The Second Circuit squarely held that "the question

of abrogation does not turn on whether the [treaty] has been expressly identified for abrogation." *Id.*

In *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *affirmed on other grounds*, 348 U.S. 296 (1955), the Fourth Circuit voided an executive agreement between the United States and Canada regarding the importation of Canadian potatoes. The Court of Appeals did not invoke any "clear statement" rule. Instead, it opined that "the executive agreement was void because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related." *Id.* at 658. "We think that whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress. . . . Even though the regulation prescribed by the executive agreement [may] be more desirable than that prescribed by Congressional action, it is the latter which must be accepted as the expression of national policy." *Id.* at 660-61.

And in *Swearingen v. United States*, 565 F. Supp. 1019, 1021 (D. Colo. 1983), the Court held that an executive agreement was void insofar as it was inconsistent with the Internal Revenue Code. The Court mentioned no clear statement rule. Instead, the Court opined that "[t]reaty provisions are the 'supreme Law of the Land,' U.S. Const. Art. VI, cl. 2, and, depending on the subject matter, may supersede prior inconsistent acts of Congress. The same cannot be said of executive agreements, which,

unlike treaties, require no Senate ratification and are not directly authorized by or described in the Constitution." *Id.* at 1021 (citations omitted).[2]

B. THE D.C. CIRCUIT'S HOLDING RAISES GRAVE SEPARATION OF POWERS CONCERNS.

In addition to creating a circuit conflict, the D.C. Circuit's decision raises serious constitutional questions as a matter of the separation of powers. The D.C. Circuit held that the Algiers Accords – an unratified executive agreement implemented through administrative regulations – may not be displaced by Congress through legislation enacted by both Houses and signed by the President, unless the legislature satisfies the requirements of a "clear statement" rule. This decision inverts the proper relationship between the executive branch and the lawmaking function of Article I. This case therefore presents an ideal opportunity to elaborate further the proper relationship between Congress and the executive in international relations – an issue identified but not fully addressed in *American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2393 (2003) ("There is, however, no need to consider the possible

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[2] The cases cited by the D.C. Circuit do not articulate or support its "clear statement" rule. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984) (cited App. 17a), was a case raising the issue of whether an act of Congress implicitly repealed an entirely unrelated ratified, self-executing treaty. *Weinberger v. Rossi*, 456 U.S. 25 (1982) (cited App. 17a), involved a question of statutory interpretation not presented by this case – whether the term "treaty" in *that case-specific* statute was limited to Art. II treaties or instead extended to other forms of international agreements.

significance for preemption doctrine of tension between an Act of Congress and Presidential foreign policy. . . .").

In the landmark decision of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) ("*Steel Seizure*"), this Court held that, given Congressional silence, the President lacked the power to seize and operate steel mills, even in the face of a wartime strike threat. This Court focused on the need for legislative authorization of executive action:

> Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States . . ." After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Id. at 587.

The *Steel Seizure* case establishes that unilateral action by the executive branch in the face of Congressional *silence* is constitutionally impermissible. Such executive

action is even more problematic where, as here, it runs counter to Congressional *legislation*. The point was made clear by Justice Jackson in his concurring opinion in *Steel Seizure*:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 637 (concurring opinion).

In short, the D.C. Circuit had the matter backwards: Congressional legislation abrogating an executive agreement is not constitutionally suspect. Rather, the threat to the separation of powers is created by the court's own elevation of unilateral executive action over statutes enacted by Congress and signed by the President.

"[A]n unratified executive agreement, unlike a treaty, cannot override a prior Act of Congress." Laurence Tribe, AMERICAN CONSTITUTIONAL LAW § 4-4, at 648 (3d ed. 2000); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115, Reporter's Note 5 (1987) ("It has been held, however, that an executive agreement made by the President on a matter expressly within the constitutional authority of Congress, such as the regulation of commerce with foreign nations, is subject to the

controlling authority of Congress and will not be given effect in the face of an inconsistent Congressional act.").[3]

This principle applies *a fortiori* to the supremacy of a *subsequent* act of Congress over *a prior* unratified executive agreement. In such a circumstance, the supremacy of Congressional action is clear both because of the rule of *lex posterior* and because a statute trumps a mere executive order. The D.C. Circuit therefore erred in imposing a "plain statement" rule. Congress should not have to speak with crystal clarity in order to overcome an unratified executive agreement, particularly where the agreement (like the Algiers Accords) is not self-executing and is predicated upon administrative regulations promulgated in the Code of Federal Regulations. Congress need not comply with a "clear statement" rule in order to displace administrative regulations.

This case does not involve a repeal by implication issue requiring that the legislative acts of one Congress be harmonized with those of another Congress. That is, the D.C. Circuit was not asked to reconcile potential inconsistencies between two competing pieces of legislative action

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[3] The precise scope of the executive's power to conclude international agreements without the consent of the Senate is unresolved. *See* Tribe, AMERICAN CONSTITUTIONAL LAW at 648-50; Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (arguing lack of constitutional basis for certain types of executive agreements); Borchard, *Shall the Executive Agreement Replace the Treaty?* 53 YALE L.J. 664 (1944) (arguing that certain international agreements can be made only by treaties); Borchard, *Treaties and Executive Agreements – A Reply*, 54 YALE L.J. 616 (1945) (same); Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 2004 n.16 (2003) (noting debate).

(either two statutes or a statute and a Senate-ratified treaty). Rather, the only interpretive question in this case is the meaning of congressional action regarding claims by Plaintiffs and other victims of terrorism, beginning in the 1996 Antiterrorism Act and concluding with legislation enacted during the pendency of this case. When, as here, Congress has never adopted the Algiers Accords, the legislature cannot be preempted from enacting domestic legislation by means of administrative regulations – especially regulations that this Court has held are not justified by the statute upon which they are allegedly predicated, the International Emergency Economic Powers Act ("IEEPA"), Title II, Pub. L. No. 95-223, 91 Stat. 1626 et seq. (codified at 50 U.S.C. § 1701). *See Dames & Moore v. Regan*, 453 U.S. 654, 675 (1981) ("The terms of the IEEPA therefore do not authorize the President to suspend claims in American courts. This is the view of all the courts which have considered the question.").

The subsequent nature of the Congressional action in this case is critical. Congress specifically addressed Plaintiffs' claims fifteen years after the Algiers Accords. The creation of judicial jurisdiction to consider claims and the abrogation of sovereign immunity under the FSIA are uniquely legislative acts, not executive prerogatives. Any executive agreement or implementing regulation that purported to preempt such legislative authority would violate the separation of powers. *Cf. Dames & Moore*, 453 U.S. 668-69 (noting separation-of-powers concerns); *id.* at 688 (cautioning that "[w]e are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority"); *id.* (emphasizing "the narrowness of our decision. We do not decide that the President possesses plenary power to settle

claims, even as against foreign governmental entities. . . . But where, as here, . . . we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.").

The question presented gains special significance in light of burgeoning international trade and commercial agreements covering broad issues of domestic importance. Creation of a clear statement rule for executive agreements would enable the Executive Branch to thwart congressional authority to enact legislation on domestic affairs by the mere promulgation of administrative regulations implementing such agreements. The Executive should not be permitted to preempt the law-making role of Congress over domestic affairs.

The D.C. Circuit's decision also runs counter to the well-established jurisprudence that international agreements are given domestic effect only if they are self-executing or are implemented by Congressional legislation. "When the stipulations [of a treaty] are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *see also Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 311 (1829); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) (citing *Head Money Cases*, 112 U.S. 580 (1884)); *Igartua de la Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (per curiam); *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283 (9th Cir. 1985) (non-self-executing international agreements "are merely[] agreements between the two nations and have no effect on domestic law absent

additional governmental action"); *United States v. Postal*, 589 F.2d 862, 875 (5th Cir. 1979).

The plain statement rule thus has no place in this case. That rule is appropriate in cases implicating important principles of federalism because "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). The "requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* But Congressional abrogation of unratified executive agreements is entirely different and is in no way constitutionally suspect. Indeed, Congress has enacted numerous statutory restrictions on executive agreements. For example, the War Powers Resolution of 1973, 50 U.S.C. §§ 1541-48, inhibits the President from making agreements that commit the United States to introduce armed forces into hostilities or into situations where involvement in hostilities is likely, or to increase or redeploy United States combat forces abroad. The Arms Control and Disarmament Act of 1961 provides that no action may be taken "pursuant to this or any other Act" that would commit the United States "to reduce or limit the Armed Forces or armaments of the United States in a militarily significant manner" except pursuant to the treaty making power or unless authorized by further affirmative legislation by Congress. 22 U.S.C. § 2573(b). And 19 U.S.C. § 2111 limits the President's power to make executive agreements lowering tariffs.

Nor is there anything suspect about judicial construction of legislation and executive agreements affecting foreign policy. "[T]he courts have the authority to construe

. . . executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). "[U]nder the Constitution, one of the judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.* This Court has recognized that foreign policy implications do not prevent judicial resolution of important legal questions. *See Rasul v. Bush*, No. 03-334, and *al Odah v. United States*, No. 03-343 (rights of detainees on Guantanamo); *Hamdi v. Rumsfeld*, No. 03-6696 (authority of President to detain citizen as enemy combatant); *Sosa v. Alvarez-Machain*, No. 03-339, and *United States v. Alvarez-Machain*, No. 03-485 (authority to arrest suspects abroad).

Tellingly, the D.C. Circuit's holding goes beyond the Government's position before the Court of Appeals. In its brief as Appellee, the Government agreed that "the question of abrogation does not turn upon whether the [agreement] has been expressly identified for abrogation." Govt. Br. 41 (citing *Havana Club*). The Government acknowledged that "plaintiffs could prevail if Congress had clearly and unambiguously enacted a statute that either expressly repudiates the Algiers Accords, *or* that specifically and directly conflicts with the Accords' provision that bars and precludes this suit from proceeding." Govt Br. at 35 (emphasis added). The D.C. Circuit held, however, that Plaintiffs can prevail only if Congress expressly repudiates the Algiers Accords in statutory language. The court's holding warrants plenary review.

C. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED.

This case presents an especially appropriate opportunity to resolve the question presented because the D.C. Circuit's invocation of a "clear statement" requirement has demonstrably frustrated Congressional intent. In this case, Congress engaged in a most unusual dialogue with the district court in order repeatedly to affirm its intent that the Algiers Accords would not bar Plaintiffs' claims against Iran. After the Government sought to intervene in this case pursuant to the Algiers Accords and moved to vacate a default judgment in Plaintiffs' favor, Congress enacted – and the President signed on the same day – an appropriations bill with a provision amending the FSIA to provide that § 1605(a)(7)(A) would be satisfied if "the act is related to Case Number 1:00CV03110 (ESG) [sic] in the United States District Court for the District of Columbia." Pub. L. No. 107-77, § 626(c), 115 Stat. 748, 803 (2001). Six weeks later, Congress corrected an error in the case number: "Section 626(c) of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 2002 (Public Law No. 107-77) is amended by striking '1:00CV03110 (ESG)' and inserting '1:00CV03110 (EGS).'" Pub. L. No. 107-117, Div. B, § 208, 115 Stat. 2230, 2299 (2002). The accompanying joint explanatory statement explained that "[t]he provision [Section 626(c), as amended] . . . acknowledges that, *notwithstanding any other authority*, the American citizens who were taken hostage by the Islamic Republic of Iran in 1979 have a claim against Iran under the Antiterrorism Act of 1996 and the provision specifically allows the judgment to stand. . . ." H.R. Conf. Rep. No. 107-350, at 422-23 (2001) (emphasis added).

The statutory language of Section 626(c) was enacted for the benefit of these very Plaintiffs and makes clear that Congress meant to reaffirm that these Plaintiffs have a claim against Iran. Indeed, the D.C. Circuit acknowledged that the legislative history of Section 626(c) contained "the type of language that might abrogate an executive agreement – if the statement had been enacted." App. 16a. The language of Section 626(c) was incorporated into the text of the Antiterrorism Act after the District Court had entered a default judgment as to Iran's liability in this case. Any question about abrogation of the Algiers Accords was answered by enactment of Section 626(c).

A commentator has concluded that the D.C. Circuit "ought to have held that Congress unambiguously intended to abrogate the Algiers Accords in passing the 2001 riders." *Recent Cases*, 117 HARV. L. REV. 743, 747 (2003). "Only one interpretation of the 2001 riders furthers [Congress'] goals: the interpretation that Congress wished to compensate the Roeder plaintiffs and therefore to breach the Algiers Accords." *Id.* at 748. "Congress could not have intended the riders to allow the plaintiffs to voice their claims against Iran in court while permitting the certain dismissal of these claims due to the untouched substantive bar of the Algiers Accords." *Id.*

The effect of the D.C. Circuit's holding is that Congress twice enacted legislation – for the express benefit of these Plaintiffs – only for the purpose of having the District Court announce that the Plaintiffs' claims were extinguished two decades ago by an unratified executive agreement. The panel maintained that it was not presuming that Congress "did a futile thing" (App. 18a-19a) because, under its interpretation, "[i]f constitutional, the amendments had the effect of removing Iran's sovereign immunity." *Id.*

But it is evident that Congress intended to do much more than simply provide plaintiffs with an opportunity to argue that the Algiers Accords were invalid for duress or other reasons. Congress intended to provide a meaningful remedy for the terrible ordeal that the Plaintiffs and their families endured.

In any event, the court failed to recognize that, by themselves, the undisputed statutory removal of Iran's sovereign immunity and the creation of federal judicial jurisdiction were enough to abrogate the Algiers Accords. The Accords prohibited the hostages "from prosecuting in any court within the United States . . . any claim against the Government of Iran." 31 C.F.R. § 535.216(a). In the District Court the Government contended that the mere prosecution of this suit violated the Algiers Accords. Thus the acknowledged congressional creation of federal court jurisdiction over terror-related claims is contrary to the command of the Algiers Accords to prevent the hostages from prosecuting actions in federal court. Such Congressional action is itself proof of abrogation.

Further confirmation of abrogation is the D.C. Circuit's own suggestion that, as a result of Congressional action, the federal courts now have authority to decide Plaintiffs' claim that the specific provisions of the Accords barring claims by former hostages are unenforceable for duress. App. 19a & n.7. If Congress has created judicial jurisdiction for courts to adjudicate the validity of the Algiers Accords, then it plainly has authorized courts to entertain lawsuits relating to their claims. Thus, the D.C. Circuit failed to carry its own interpretation of Congressional action to its logical conclusion.

Indeed, after its decision in this case, the D.C. Circuit subsequently held that 28 U.S.C. § 1605(a)(7), enacted in the 1996 Antiterrorism Act, "abrogates foreign sovereign immunity and provides jurisdiction in specified circumstances" for suits against foreign states that sponsor terrorism. *Cicippio-Puleo v. Islamic Republic of Iran*, 2004 WL 66771, *1 (D.C. Cir. Jan. 16, 2004). The D.C. Circuit also held that the Flatow Amendment, 28 U.S.C. § 1605 note, creates a federal cause of action against individual officials, employees, and agents of foreign states that sponsor terrorism. "What § 1605(a)(7) does is to make it clear that designated foreign state sponsors of terrorism will be amenable to suits in United States courts for acts of terrorism in cases in which there is a viable cause of action." *Id.* at *10. Presumably, the D.C. Circuit had in mind state-law causes of action (such as those asserted by Plaintiffs in this case) for assault, battery, false imprisonment, and the like, coupled with respondeat superior and other principles of vicarious liability. The D.C. Circuit remanded the *Cicippio-Puleo* case "to allow plaintiffs an opportunity to amend their complaint to state a cause of action under some other source of law, including state law. . . ." *Id.* at 11.

The D.C. Circuit's own subsequent recognition in *Cicippio-Puleo* that Congress has expressly created a federal forum and a federal cause of action against individual officials, employees, and agents of foreign states that sponsor terrorism and has expressly removed immunity for suits (like Plaintiffs' action) under state law against the foreign states themselves makes its conclusion in *this* case that Congress has not abrogated Algiers Accords all the more paradoxical.

The D.C. Circuit's decision has demonstrably frustrated congressional intent and impermissibly elevated an unratified executive agreement over a statute enacted by the legislature and signed by the President. The Court's judgment conflicts with precedent of this Court and with decisions in other circuits. The D.C. Circuit's decision also runs counter to bedrock principles of the separation of powers and dramatically increases the power of the Executive Branch to displace the legislative will of Congress by means of unratified executive agreements with other nations or their agencies.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 12, 2003 Decided July 1, 2003

No. 02-5145

David M. Roeder, et al.,
Appellants

v.

Islamic Republic of Iran, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia
(00cv03110)

V. Thomas Lankford argued the cause for appellants. With him on the briefs were William Coffield, Terrance G. Reed, Roark M. Reed, and Jonathan S. Massey.

Stuart H. Newberger, Michael L. Martinez, and Laurel Pyke Malson were on the brief for amici curiae Blake Kilburn, et al. in support of appellants.

H. Thomas Byron III, Attorney, U.S. Department of Justice, argued the cause for appellee United States of America. With him on the brief were Roscoe C. Howard, Jr., U.S. Attorney, and Douglas N. Letter, Litigation Counsel, U.S. Department of Justice.

Before: Henderson, Randolph, and Garland, Circuit Judges.

Opinion for the Court filed by Circuit Judge Randolph.

Randolph, Circuit Judge: Americans taken hostage in Iran in 1979 and held for 444 days brought a class

action on behalf of themselves, and their spouses and children, against the Islamic Republic of Iran and its Ministry of Foreign Affairs. The district court, Sullivan, J., issued a comprehensive opinion and ordered the action dismissed for failure to state a claim. *Roeder v. Islamic Republic of Iran,* 195 F. Supp. 2d 140 (D.D.C. 2002). Among the several issues presented on appeal, the principal question is whether legislation specifically directed at this lawsuit, and enacted while the case was pending in the district court, provided a cause of action for the hostages and their families.

I.

The district court ably summarized the case and the reasons for its decision:

"Members of this plaintiff class previously attempted to sue Iran, but their claims were dismissed because Congress had not waived Iran's sovereign immunity. *See Persinger v. Islamic Republic of Iran,* 729 F.2d 835 (D.C. Cir. 1984); *McKeel v. Islamic Republic of Iran,* 722 F.2d 582 (9th Cir. 1983); *Ledgerwood v. State of Iran,* 617 F. Supp. 311 (D.D.C. 1985). In 1996, Congress passed the Federal Anti-Terrorism and Effective Death Penalty Act ("the 1996 Anti-terrorism Act") and the Flatow Amendment, which together waived foreign sovereign immunity and created a cause of action for individuals harmed by state-sponsored acts of terrorism. 28 U.S.C. § 1605(a)(7) and note. With the assistance of their counsel, plaintiffs brought this action under those statutes, arguing that this new cause of action applied to the 1979 hostage taking in Tehran, and asking for compensatory and punitive damages of $33 billion.

"Iran chose not to defend its actions in this Court, despite its long history of adjudicating claims in this Circuit. *See, e.g., McKesson HBOC, Inc. v. Islamic Republic of Iran,* 271 F.3d 1101 (D.C. Cir. 2001). Plaintiffs therefore proceeded with their claims unopposed, and at plaintiffs' request the Court entered a default judgment on liability on August 13, 2001. The Court scheduled a date for a trial to hear evidence on damages, at which several of the plaintiffs were scheduled to testify about their experiences. The Court did not look lightly upon requiring plaintiffs to relive their terrible ordeal and appreciated the difficulty of both testifying and witnessing such testimony.

"On the eve of trial, however, the State Department, recently made aware of plaintiffs' claims, attempted to intervene, vacate the judgment, and dismiss the suit. Plaintiffs' hopes of recovery were once again placed in jeopardy. The United States argued that the Algiers Accords, the 1980 bilateral agreement between the United States and Iran, by which the hostages' release was secured, and its implementing regulations, contain a prohibition on lawsuits arising out of the hostage-taking at issue here. *See* Govt's Mem. in Supp. of Mot. to Vacate of 10/12/01. Because no act by Congress had specifically abrogated the Accords, the government argued, that agreement precludes plaintiffs' claims and the case should be dismissed. The United States also raised several other arguments interpreting the Foreign Sovereign Immunities Act that this Court lacked jurisdiction to hear plaintiffs' claims, and that plaintiffs' claims should be dismissed on the merits.

"Because of the last-minute nature of the government's [motion] to intervene, rather than deny plaintiffs, many of whom had traveled from distant parts of the

country, the opportunity to present their testimony on the record, the Court proceeded with the trial. For two days, the Court heard the harrowing accounts of 444 days spent in captivity from both the former hostages and their family members. The Court scheduled a later date to hear argument on the government's motions and established a briefing schedule to afford the plaintiffs an opportunity to respond to the government's arguments. The Court also directed plaintiffs' counsel to explain why they had not brought the Algiers Accords to the Court's attention earlier.

"On November 28, 2001, the date that the government's reply brief was due, the case took yet another dramatic turn. The government informed the Court that Congress had recently passed, and the President had signed on that very day, an appropriations bill with a provision amending the Foreign Sovereign Immunities Act that specifically referred to this case. *See* Subsection 626(c) of Pub. L. 107-77, 115 Stat. 748 (2001) ("Subsection 626(c)"). After hearing argument from counsel on the impact of the appropriations rider, this Court expressed its serious concern about the lack of clarity in Congress' recent action.

"After the Court took this case under advisement, Congress acted yet again. On December 20, 2001, Congress passed yet another appropriations rider that added a technical amendment to Subsection 626(c) and contained language in its legislative history purporting to explain the legislative intent behind the earlier Subsection 626(c). *See* Section 208 of the Department of Defense and Emergency Supplemental Appropriations Act, Pub. L. 107-117, 115 Stat. 2230 ("Section 208"). However, . . . while

Congress' intent to interfere with this litigation was clear, its intent to abrogate the Algiers Accords was not.

"Were this Court empowered to judge by its sense of justice, the heart-breaking accounts of the emotional and physical toll of those 444 days on plaintiffs would be more than sufficient justification for granting all the relief that they request. However, this Court is bound to apply the law that Congress has created, according to the rules of interpretation that the Supreme Court has determined. There are two branches of government that are empowered to abrogate and rescind the Algiers Accords, and the judiciary is not one of them. The political considerations that must be balanced prior to such a decision are beyond both the expertise and the mandate of this Court. Unless and until either the legislative or executive branch acts clearly and decisively, this Court can not grant plaintiffs the relief they seek." *Roeder,* 195 F. Supp. 2d at 144-45.

The Algiers Accords, mentioned in the district court's summary, is an executive agreement of importance to this case. In order to secure the hostages' release, the United States froze Iranian government assets, imposed trade sanctions, prosecuted a claim before the International Court of Justice, and undertook a military rescue operation. *See Persinger v. Islamic Republic of Iran,* 729 F.2d 835, 837 n.1 (D.C. Cir. 1984). These efforts failed. On January 19, 1980, the United States entered into the Algiers Accords, settling a broad range of disputes between this country and Iran. *See generally* Iran-United States: Settlement of the Hostage Crisis, 20 I.L.M. 223 (1981). As part of the Accords, the United States agreed to "bar and preclude the prosecution against Iran of any . . . claim of . . . a United States national arising out of the events . . . related to (A) the seizure of the 52 United States nationals

on November 4, 1979, [and] (B) their subsequent detention." *Id.*, Declaration of the Government of the Democratic and Popular Republic of Algeria, General Principles, ¶ 11, 20 I.L.M. at 227. The hostages were released the next day. President Carter, on his last full day in office, issued an executive order directing the Secretary of the Treasury to issue regulations implementing this provision, and directing and authorizing the Attorney General to take appropriate measures to notify the judiciary of the Order. Non-Prosecution of Claims of Hostages and for Actions at the United States Embassy and Elsewhere, Exec. Order No. 12,283, 46 Fed. Reg. 7927 (Jan. 19, 1981); *see also* Prohibition Against Prosecution of Certain Claims, 31 C.F.R. § 535.216(a). After the change in administrations, President Reagan ratified this executive order and related ones. Suspension of Litigation Against Iran, Exec. Order No. 12,294, § 8, 46 Fed. Reg. 14,111 (Feb. 24, 1981).

II.

A.

One of the issues plaintiffs raise is whether the district court erred in permitting the United States to intervene as a defendant. We wonder how a reversal of that ruling would assist plaintiffs. The Foreign Sovereign Immunities Act – FSIA – does not automatically entitle a plaintiff to judgment when a foreign state defaults. The court still has an obligation to satisfy itself that plaintiffs have established a right to relief. 28 U.S.C. § 1608(e). The district court did not mention the Algiers Accords when the default judgment was entered, but that was because

plaintiffs' counsel had not alerted the court to the Accords.[1] After the Justice Department informed the court of the Accords, the court performed its duty under § 1608(e) and determined that plaintiffs were not entitled to relief. We see no basis for assuming that the court, having become aware of this impediment to plaintiffs' action, would have reached a different result if it had denied the government's motion to intervene. In other words, even if the Justice Department had appeared only in the capacity of *amicus curiae,* the outcome would not have changed.

At all events it is clear to us that the court properly granted the United States leave to intervene as of right. Federal Rule of Civil Procedure 24(a) provides that an applicant for intervention must file a "timely application" and demonstrate that it has "an interest relating to the property or transaction which is the subject matter of the action" and that "the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *See also Smoke v. Norton,* 252 F.3d 468, 470 (D.C. Cir. 2001). The district court correctly analyzed each of these factors. Timeliness is measured from when the prospective intervenor "knew or should have known that any of its rights would be directly affected by the litigation." *Nat'l Wildlife Fed'n v. Burford,*

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[1] The court criticized plaintiffs' counsel for failing to "bring to this Court's attention the Algiers Accords and implementing regulations despite the FSIA's requirement that plaintiffs 'establish[ed] [their] claim or right to relief by evidence that is satisfactory to the Court.' 28 U.S.C. § 1608(e)." *Roeder,* 195 F. Supp. 2d at 185 (alterations in original).

878 F.2d 422, 433-34 (D.C. Cir. 1989), *rev'd on other grounds sub nom. Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871 (1990). Here, the government moved to intervene less than thirty days after the State Department received notice of the potential conflict with the executive agreement. As to the government's interest, plaintiffs suppose it is in providing Iran with a defense. That is incorrect. The government's interest is in upholding the Algiers Accords, an interest that would be impaired if plaintiffs obtained a judgment in violation of the Accords. We have already decided that the interest of the United States in meeting "its obligations under the executive agreement with Iran" entitled it to intervene as a defendant. *See Persinger,* 729 F.2d at 837. And because Iran failed to appear before the district court, the interest of the United States was not represented by the existing parties.

Although the government thus satisfied the requirements of Rule 24(a), decisions of this court hold an intervenor must also establish its standing under Article III of the Constitution. *See, e.g., Fund for Animals, Inc. v. Norton,* 322 F.3d 728, 731-32 (D.C. Cir. 2003); *Bldg. & Constr. Trades Dep't v. Reich,* 40 F.3d 1275, 1282 (D.C. Cir. 1994). The court's opinion in *Rio Grande Pipeline Co. v. FERC,* 178 F.3d 533, 538 (D.C. Cir. 1999), identified a split in the circuits on the subject of intervenor standing. We were dealing there with intervention in the court of appeals under 28 U.S.C. § 2348. As to intervention in the district court, requiring standing for an applicant wishing to come in on the side of a plaintiff who has standing runs into the doctrine that Article III is satisfied so long as one party has standing. *See, e.g., Watt v. Energy Action Found.,* 454 U.S. 151, 160 (1981); *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey*

Circus, 317 F.3d 334, 338 (D.C. Cir. 2003). Requiring standing of someone who seeks to intervene as a defendant, *see Fund for Animals,* 322 F.3d at 730-32, runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction. *See Virginia v. Hicks,* 71 U.S.L.W. 4441, 4443 (U.S. June 16, 2003). Still, there is no need to dwell on the issues thus raised. With respect to intervention as of right in the district court, the matter of standing may be purely academic. One court has rightly pointed out that any person who satisfies Rule 24(a) will also meet Article III's standing requirement. *Sokaogon Chippewa Cmty. v. Babbitt,* 214 F.3d 941, 946 (7th Cir. 2000). So here. The United States established that it was in imminent danger of suffering injury in fact – a breach of its obligations under the Accords. There was a "causal connection between the injury and the conduct complained of" and the injury was capable of judicial redress. *Bennett v. Spear,* 520 U.S. 154, 167 (1997). The United States therefore had standing as a defendant-intervenor.

With this much settled, the error of plaintiffs' claim that the United States could not properly move to vacate the default judgment becomes apparent. The United States was not asserting defenses personal to the parties in default – Iran and its Ministry of Foreign Affairs. The government entered the case to assert its own defenses under the Algiers Accords. As an intervenor, the United States "participates on an equal footing with the original parties to a suit." *Bldg. & Constr. Trades Dep't,* 40 F.3d at 1282. The United States therefore had the right to move under Rule 60(b) of the Federal Rules of Civil Procedure to vacate the default judgment against the defendants.

B.

One other preliminary issue deals with the legal status of Iran's Ministry of Foreign Affairs. The Flatow amendment to the FSIA, set forth at 28 U.S.C. § 1605 note,[2] provides a cause of action against officials, employees, and agents of foreign states. Because it is unclear whether the amendment also provides a cause of action against the foreign state,[3] plaintiffs maintain that the Ministry of Foreign Affairs is merely an agent of Iran, not its alter ego. In *Transaero, Inc. v. La Fuerza Aerea Boliviana,* 30 F.3d 148, 149-50 (D.C. Cir. 1994), we concluded that a nation's air force is a "foreign state or political subdivision" rather than an "agency or instrumentality" of the nation for purposes of the service-of-process provisions of the FSIA. "Any government of reasonable complexity must act through men organized into offices and departments." *Id.* at 153. We adopted a categorical approach: if the core functions of the entity are governmental, it is

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[2] "An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under [28 U.S.C. § 1605(a)(7)] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in [§ 1605(a)(7)]." 28 U.S.C. § 1605 note.

[3] In view of the Flatow amendment's failure to mention the liability of foreign states, it is "far from clear" that a plaintiff has a substantive claim against a foreign state under the Foreign Sovereign Immunities Act. *Price v. Socialist People's Libyan Arab Jamahiriya,* 294 F.3d 82, 87 (D.C. Cir. 2002); *see also Bettis v. Islamic Republic of Iran,* 315 F.3d 325, 330 (D.C. Cir. 2003). We have yet to decide the question and see no reason to do so here.

considered the foreign state itself; if commercial, the entity is an agency or instrumentality of the foreign state. A nation's armed forces are clearly on the governmental side. *Id.* For similar reasons, the Ministry of Foreign Affairs must be treated as the state of Iran itself rather than as its agent.[4] The conduct of foreign affairs is an important and "indispensable" governmental function. *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 160 (1963).

III.

This brings us to the principal issue. The authority of the President to settle claims of American nationals through executive agreements is clear. *See Am. Ins. Ass'n v. Garamendi,* 2003 WL 21433477, at *11 (U.S. June 23, 2003); *id.* at *23 (Ginsburg, J., dissenting). There is no doubt that laws passed after the President enters into an executive agreement may abrogate the agreement. The question here is whether legislation enacted while the case was pending abrogated the Algiers Accords.

The FSIA provides generally that a foreign state is immune from the jurisdiction of the United States courts unless one of the exceptions listed in 28 U.S.C. § 1605(a) applies. *See Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 434-35 (1988). At the time plaintiffs filed their complaint and up to entry of the default

[4] Plaintiffs suggest that the legislative intent expressed in 28 U.S.C. § 1606 and the principles of respondeat superior and ratification create liability for Iran based upon the actions of its Ministry of Foreign Affairs. Because the two defendants are not legally distinct, plaintiffs must show an abrogation of the Algiers Accords to subject either defendant to liability.

judgment of liability, none of the exceptions applied to this case. Section 1605(a)(7)(A), added as part of the Antiterrorism and Effective Death Penalty Act of 1996, allowed an exception to the immunity bar if plaintiffs showed that the foreign state had been designated a state sponsor of terrorism when the act occurred or as a result of the act. 28 U.S.C. § 1605(a)(7)(A) (2000). Iran had not been so designated.

After the United States moved to intervene and vacate the default judgment, Congress amended the FSIA. A provision in an appropriations act stated that § 1605(a)(7)(A) would be satisfied (that is, the immunity of the foreign state would not apply) if "the act is related to Case Number 1:00CV03110(ESG) [sic] in the United States District Court for the District of Columbia." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, § 626(c), 115 Stat. 748, 803 (2001). Six weeks later, Congress corrected an error in the case number: "Section 626(c) of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 2002 (Public Law No. 107-77) is amended by striking '1:00CV03110(ESG)' and inserting '1:00CV03110(EGS).'" Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to the Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, Div. B, § 208, 115 Stat. 2230, 2299 (2002) (currently codified at 28 U.S.C.A. § 1605(a)(7)(A) (Supp. 2003)).

Together, these amendments created an exception, for this case alone, to Iran's sovereign immunity, which would otherwise have barred the action. The evident purpose was to dispose of the government's argument, in its motion to

vacate, that plaintiffs' action should be dismissed because Iran had not been designated a state sponsor of terrorism at the time the hostages were captured and held, and that Iran's later designation (in 1984) rested not on the hostage crisis but on its support of terrorism outside its borders. Mem. of P. & A. in Supp. of the United States' Mot. to Vacate the Default J. and Dismiss Pls.' Claims at 12-13 (Oct. 12, 2001) [hereinafter "Mot. to Vacate"]; *see also* Determination Pursuant to Section 6(i) of the Export Administration Act of 1979 – Iran, 49 Fed. Reg. 2836 (Jan. 23, 1984).

The question remained whether the Algiers Accords, on which the United States had relied as a second ground for dismissal, Mot. to Vacate at 18-23, survived the amendments. The Accords required the United States to "bar and preclude the prosecution against Iran of any pending or future claim of . . . a United States national arising out of the events . . . related to (A) the seizure of the 52 United States nationals on November 4, 1979, [and] (B) their subsequent detention. . . . " 20 I.L.M. at 227; *cf. Belk v. United States,* 858 F.2d 706, 706 (Fed. Cir. 1988) (affirming summary judgment for the United States in action by some of the plaintiffs here asserting that the barring of their actions by the Accords constituted a taking by the government). The amendments do not, on their face, say anything about the Accords. They speak only to the antecedent question of Iran's immunity from suit in United States courts. Plaintiffs therefore urge us to consider statements in the "Conference Report" on the second appropriations act, which made the technical correction to the case number. These statements, plaintiffs say, show that Congress expressly recognized a conflict

between their lawsuit and the Accords and passed the amendments to resolve the conflict in plaintiffs' favor.

Some words about conference reports are in order. After the House and the Senate pass different versions of legislation, each body appoints conferees to resolve disagreements between the House and Senate bills. If a majority of the conferees from each body agree, they submit two documents to their respective houses: a conference report presenting the formal legislative language and a joint explanatory statement that explains the legislative language and how the differences between the bills were resolved. Each body must vote on approving the conference report in its entirety and may not approve it only in part or offer any amendments. *See generally* Stanley Bach & Christopher M. Davis, Congressional Research Service, Conference Reports and Joint Explanatory Statements (2003).

Plaintiffs told us at oral argument that both houses voted on the language of the conference report. This is accurate. But it is not the conference report – which consists of the text of the legislation – on which plaintiffs rely. The statements they think important are in the joint explanatory statement, which is in the form of a committee report. While both the conference report and the joint explanatory statement are printed in the same document, Congress votes only on the conference report. Courts, including the Supreme Court, have not always been precise about this, referring sometimes to material in joint explanatory statements as the conference report. *See, e.g., City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002) (quoting the "Joint Explanatory Statement of the Committee of Conference" in H.R. Conf. Rep. No. 103-677, at 87 (1994), and referring to it as the

"Conference Report"); *INS v. St. Cyr,* 533 U.S. 289, 317 (2001) (quoting the "Joint Explanatory Statement of the Committee of Conference" in H.R. Conf. Rep. No. 104-828, at 222 (1996), and referring to it as the "Conference Report"); *see also* George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History,* 1990 Duke L.J. 39, 48 ("Almost invariably, courts employ the shorthand 'committee report' when referring to the explanatory statement of the managers. . . . "). We do not say material in the joint explanatory statement is of no value in determining Congress' intent. *See Demby v. Schweiker,* 671 F.2d 507, 510 (D.C. Cir. 1981) (opinion of MacKinnon, J.); *see also Moore v. District of Columbia,* 907 F.2d 165, 175 (D.C. Cir. 1990) (en banc). The point is that contrary to what plaintiffs suggest, the explanatory remarks in the "conference report" do not have the force of law.

The joint explanatory statement relating to Congress' first amendment, § 626(c), contains nothing to indicate that any conferee took account of the Algiers Accords. The only relevant remarks are that the amendment "quashes the State Department's motion to vacate the judgment obtained by plaintiffs in [this case]" and that the United States is not required to "make any payments to satisfy the judgment." H.R. Conf. Rep. No. 107-278, at 170 (2001). The motion of course was on behalf of the United States, not the State Department, and it is open to question whether Congress may dictate the outcome of a particular

judicial proceeding.[5] We put these matters to the side. The government's motion to dismiss rested not only on plaintiffs' failure to bring their case within one of the exceptions to the general rule of foreign sovereign immunity, but also on the bar set up in the Algiers Accords. The text of § 626(c) is consistent with removing the government's first argument for dismissal. It says nothing about the second.

The joint explanatory statement relating to § 208, which corrected the typographical error in § 626(c), declares that the earlier amendment "quashed" the "Department of State's motion to vacate" and mentions that, in the intervening weeks, the "Department of State" continued to argue that the judgment should be vacated. It then explains the meaning of § 626(c): "The provision . . . acknowledges that, *notwithstanding any other authority,* the American citizens who were taken hostage by the Islamic Republic of Iran in 1979 have a claim against Iran under the Antiterrorism Act of 1996 and the provision specifically allows the judgment to stand. . . . " H.R. Conf. Rep. No. 107-350, at 422-23 (2001) (emphasis added). This statement, and the italicized language in particular, is the type of language that might abrogate an executive agreement – if the statement had been enacted. But Congress

[5] We do not decide whether the amendments, relating as they did specifically to a pending action, violated separation-of-powers principles by impermissibly directing the result of pending litigation. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992).

did not vote on the statement and the President did not sign a bill embodying it.[6]

There is thus no clear expression in anything Congress enacted abrogating the Algiers Accords. Yet neither a treaty nor an executive agreement will be considered "'abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.'" *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (quoting *Cook v. United States*, 288 U.S. 102, 120 (1933)); *see Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 936-37 (D.C. Cir. 1988). The way Congress expresses itself is through legislation. While legislative history may be useful in determining intent, the joint explanatory statements here go well beyond the legislative text of § 208, which did nothing more than correct a typographical error. Moreover, the explanatory statements, rather than explain the language of § 208, deal with the previously enacted § 626(c). Such legislative history alone cannot be sufficient to abrogate a treaty or an executive agreement. *See Gray Panthers Advocacy Comm. v. Sullivan*, 936 F.2d 1284, 1288 (D.C. Cir. 1991).

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[6] Upon signing the first appropriations act, President Bush stated: "the Executive Branch will act, and encourage the courts to act, with regard to Subsection 626(c) of the bill in a manner consistent with the obligations of the United States under the Algiers Accords. . . . " Statement by President George W. Bush Upon Signing H.R. 2500, 2002 U.S.C.C.A.N. 886, 887 (Nov. 28, 2001). In signing the bill containing the technical correction, the President issued a similar statement. *See* Statement by President George W. Bush Upon Signing H.R. 3338, 2002 U.S.C.C.A.N. 1776, 1778-79 (Jan. 10, 2002).

Courts have insisted on clear statements from Congress in other contexts. These include a waiver of federal sovereign immunity, *see United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992); retroactivity of statutes, *see Landgraf v. USI Film Products*, 511 U.S. 244, 271-72 (1994); repeal of habeas jurisdiction, *see St. Cyr*, 533 U.S. at 298-99; waiver of Eleventh Amendment immunity, *Dellmuth v. Muth*, 491 U.S. 223, 230-31 (1989); and a significant alteration in the balance of power between Congress and the President, *see Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991). In *Dellmuth*, a case dealing with a waiver of Eleventh Amendment immunity, the Court held that if "Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile. . . . " 491 U.S. at 230. Executive agreements are essentially contracts between nations, and like contracts between individuals, executive agreements are expected to be honored by the parties. Congress (or the President acting alone) may abrogate an executive agreement, but legislation must be clear to ensure that Congress – and the President – have considered the consequences. The "requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). The kind of legislative history offered here cannot repeal an executive agreement when the legislation itself is silent. *See Comm. of United States Citizens*, 859 F.2d at 936-37.

As against this, plaintiffs say that we should not presume that Congress, in passing the amendments, did "a futile thing." *Halverson v. Slater*, 129 F.3d 180, 185

(D.C. Cir. 1997). But we are presuming no such thing. The amendments were not futile acts. If constitutional, *see supra* note 5, the amendments had the effect of removing Iran's sovereign immunity, which the United States had raised in its motion to vacate. This enabled plaintiffs to argue that the Accords were not a valid executive agreement.[7] Plaintiffs in fact made this argument in the district court (but they do not make it here). *See* Pls.' Supplemental Brief at 9-12 (Jan. 22, 2002); 195 F. Supp. 2d at 168. That the district court rejected the argument is of no moment. Plaintiffs' opportunity to have it decided resulted directly from the amendments.

Plaintiffs also cite § 2002 of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541-42, to show that they have stated a cause of action. Section 2002 states only that if an individual has a judgment against Iran, the United States will pay it if the statutory requirements are satisfied. The question in this case is whether plaintiffs are legally entitled to such a judgment. We agree with the district court that they are not.

We have considered plaintiffs' other arguments but see no need to set forth our reasons for rejecting them.

Affirmed.

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[7] For example, a member of the panel at oral argument raised the question whether an international agreement is binding if it is not entered into voluntarily but "at the point of a gun" to obtain release of the hostages.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. ROEDER, *et al.*, Plaintiffs,	)	
v.	)	Civ. Action No. 00-3110 (EGS) [30-1] [30-2] [37-1]
THE ISLAMIC REPUBLIC OF IRAN and THE MINISTRY OF FOREIGN AFFAIRS, Defendants.	)	

MEMORANDUM OPINION

Plaintiffs filed this case seeking a belated remedy for the horrible suffering to which they were subjected by the government of the Islamic Republic of Iran more than 20 years ago. There is no dispute that members of the plaintiff class were held hostage, and at times tortured, for 444 days after being seized from the United States Embassy in Tehran by Iranian governmental officials. There is also no dispute that the spouses and children of those hostages, who comprise the remainder of the plaintiff class, were also held hostage during this time, unable to resume the normalcy of their daily lives without knowing when or if their loved ones would return. There is also no dispute that had plaintiffs been so treated by fellow United States citizens, such actions would lead to civil, and indeed, criminal liability.

Unfortunately, this litigation has only continued the roller coaster ride onto which plaintiffs were thrust over 20 years ago. Members of this plaintiff class previously attempted to sue Iran, but their claims were dismissed

because Congress had not waived Iran's sovereign immunity. *See Persinger v. Islamic Republic* [sic] *Iran,* 729 F.2d 835 (D.C. Cir. 1984); *McKeel v. Islamic Republic of Iran,* 722 F.2d 582 (9th Cir. 1983); *Ledgerwood v. State of Iran,* 617 F. Supp. 311 (D.D.C. 1985). In 1996, Congress passed the Federal Anti-Terrorism and Effective Death Penalty Act ("the 1996 Anti-terrorism Act") and the Flatow Amendment, which together waived foreign sovereign immunity and created a cause of action for individuals harmed by state-sponsored acts of terrorism. 28 U.S.C. §1605(a)(7) and note. With the assistance of their counsel, plaintiffs brought this action under those statutes, arguing that this new cause of action applied to the 1979 hostage taking in Tehran, and asking for compensatory and punitive damages of $33 billion.

Iran chose not to defend its actions in this Court, despite its long history of adjudicating claims in this Circuit. *See, e.g., McKesson HBOC, Inc. v. Islamic Republic of Iran,* 271 F.3d 1101 (D.C. Cir. 2001). Plaintiffs therefore proceeded with their claims unopposed, and at plaintiffs' request the Court entered a default judgment on liability on August 13, 2001. The Court scheduled a date for a trial to hear evidence on damages, at which several of the plaintiffs were scheduled to testify about their experiences. The Court did not look lightly upon requiring plaintiffs to relive their terrible ordeal and appreciated the difficulty of both testifying and witnessing such testimony.

On the eve of trial, however, the State Department, recently made aware of plaintiffs' claims, attempted to intervene, vacate the judgment, and dismiss the suit. Plaintiffs' hopes of recovery were once again placed in jeopardy. The United States argued that the Algiers Accords, the 1980 bi-lateral agreement between the

United States and Iran, by which the hostages' release was secured, and its implementing regulations, contain a prohibition on lawsuits arising out of the hostage-taking at issue here. *See* Govt's Mem. in Supp. of Mot. to Vacate of 10/12/01. Because no act by Congress had specifically abrogated the Accords, the government argued, that agreement precludes plaintiffs' claims and the case should be dismissed. The United States also raised several other arguments interpreting the Foreign Sovereign Immunities Act that this Court lacked jurisdiction to hear plaintiffs' claims, and that plaintiffs' claims should be dismissed on the merits.

Because of the last-minute nature of the government's last minute to intervene, rather than deny plaintiffs, many of whom had traveled from distant parts of the country, the opportunity to present their testimony on the record, the Court proceeded with the trial. For two days, the Court heard the harrowing accounts of 444 days spent in captivity from both the former hostages and their family members. The Court scheduled a later date to hear argument on the government's motions and established a briefing schedule to afford the plaintiffs an opportunity to respond to the government's arguments. The Court also directed plaintiffs' counsel to explain why they had not brought the Algiers Accords to the Court's attention earlier.

On November 28, 2001, the date that the government's reply brief was due, the case took yet another dramatic turn. The government informed the Court that Congress had recently passed, and the President had signed on that very day, an appropriations bill with a provision amending the Foreign Sovereign Immunities Act that specifically referred to this case. *See* Subsection

626(c) of Pub. L. 107-77, 115 Stat. 748 (2001) ("Subsection 626(c)"). After hearing argument from counsel on the impact of the appropriations rider, this Court expressed its serious concern about the lack of clarity in Congress' recent action.

After the Court took this case under advisement, Congress acted yet again. On December 20, 2001, Congress passed yet another appropriations rider that added a technical amendment to Subsection 626(c) and contained language in its legislative history purporting to explain the legislative intent behind the earlier Subsection 626(c). *See* Section 208 of the Department of Defense and Emergency Supplemental Appropriations Act, Pub. L. 107-117, 115 Stat. 2230 ("Section 208").

However, rather than proceed with the requisite clarity and assurance of purpose needed when legislating in the realm of foreign affairs, Congress chose to enact two provisions about which only one thing is clear: Congress' intent to interfere with ongoing litigation. This Court takes very seriously the question of whether Congress by these actions has impermissibly intruded on the exclusive judicial authority granted to this Court by virtue of Article III of the U.S. Constitution. Ultimately, however, this Court need not resolve these important constitutional questions because while Congress' intent to interfere with this litigation was clear, its intent to abrogate the Algiers Accords was not.

Were this Court empowered to judge by its sense of justice, the heart-breaking accounts of the emotional and physical toll of those 444 days on plaintiffs would be more than sufficient justification for granting all the relief that they request. However, this Court is bound to apply the

law that Congress has created, according to the rules of interpretation that the Supreme Court has determined. There are two branches of government that are empowered to abrogate and rescind the Algiers Accords, and the judiciary is not one of them. The political considerations that must be balanced prior to such a decision are beyond both the expertise and the mandate of this Court. Unless and until either the legislative or executive branch acts clearly and decisively, this Court can not grant plaintiffs the relief they seek.

Finally, while the actions of the co-equal branches of government are generally entitled to the due respect of this Court, this Court can not ignore the reality of what has occurred here. Both Congress and the President have expressed their support for these plaintiffs' quest for justice, while failing to act definitively to enable these former hostages to fulfill that quest. If the political consequences of overturning the Algiers Accords are too great, so be it, and my co-equal counterparts should say so. However, the only branches of government with the power to make that difficult decision should not with one hand express support for plaintiffs and with the other leave it to this Court to play the role of the messenger of bad news. Congress and the President possess both the power to decide and the obligation to decide with clarity.

Upon consideration of the government's motion to intervene, to vacate the entry of default judgment, and to dismiss the plaintiffs' claims, the responses and replies thereto, the further briefing requested by the Court, as well as the many oral arguments of counsel, this Court has no choice but to grant the government's motions and dismiss this case.

BACKGROUND

I. Events of 1979 and 1980

On November 4, 1979, Iranian militants seized the American Embassy in Tehran, Iran, and took as hostages more than 50 U.S. diplomatic and military personnel who were stationed there. At the same time, representatives of the Iranian government detained the American diplomatic personnel who were meeting with government representatives at the Iranian Ministry of Foreign Affairs. All of the seized individuals were citizens of the United States. All of the seized individuals were present in Iran with the permission of the Iranian government, and were serving as representatives of the United States.

These hostages remained in Iranian custody for 444 days and were subjected to physical and mental torture and inhumane conditions of confinement. At the non-jury trial conducted in this case, former hostages testified about the treatment they endured. The hostages were often blindfolded and tied to chairs or other objects for prolonged periods of time. They were at times kept in isolation from one another, and denied the right to communicate with one another or their families. Several hostages recounted physical abuse, including being kicked, beaten, punched, walked blindfolded into obstacles such as trees, and being exposed with minimal clothing to the elements. The hostages were imprisoned in cold, dark locations, including prisons, and were given only minimal clothing, food, water, and medical care.

The hostages were repeatedly interrogated by their Iranian captors. Several hostages told of being threatened with release to chanting mobs or being placed on trial in Iran for being spies. One former hostage testified that

during one interrogation he was told that his wife and children were in danger, as one of his interrogators recited exactly where the hostage's disabled son went to school, what bus he rode, and the location of his home. That hostage was told that unless he confessed his son's fingers and toes would be delivered to his wife and mother.

The former hostages also testified about simulated executions, in which they were awakened in the middle of the night, marched outside, forced to lean against a wall while listening to what they believed was a firing squad preparing its weapons and taking aim, only to be called off at the last second.

While the hostages themselves experienced 444 days of abuse, their spouses and children suffered as well. The spouses and children of former hostages testified before this Court about the dramatic impact that not knowing when or if their loved ones would return had on their lives. Spouses of the former hostages recounted their different ways of coping, including organizing a national "Yellow Ribbon" campaign to express support for bringing the hostages home. The children of former hostages testified about the impact of the experience on their childhood and lives.

There is no dispute that, at all relevant times, the individuals who seized and maintained custody of the former hostages were acting as authorized representatives of the Iranian government. The government of Iran fully endorsed, supported, and condoned the horrible conditions to which these hostages were subjected. The government of Iran refused to honor the repeated requests of the United States and third parties to release the hostages or improve the conditions of their confinement.

It was not until January 20, 1981 that the hostages were finally released.

II. The Algiers Accords

In order to obtain the freedom of the plaintiff hostages, the United States entered into an international executive agreement with the Islamic Republic of Iran on January 19, 1981. That agreement was embodied in two declarations of the government of Algeria, and became known as the Algiers Accords. *See* Govt's Mem. in Supp. of Mot. to Int. of 10/12/01, Ex. 1 (Declaration of the Democratic and Popular Republic of Algeria ("General Declaration"); Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of American [sic] and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration")) (both reprinted in 20 I.L.M. 223); *see also Dames & Moore v. Regan,* 453 U.S. 654, 662-665 (1981).

The Algiers Accords include a number of interlocking commitments made by both countries, reflecting the stated principles of (i) "restor[ing] the financial position of Iran . . . to that which existed prior to November 14, 1979," and (ii) "terminat[ing] all litigation as between the Government of each party and the nationals of the other, and [bringing] about the settlement and termination of all such claims through binding arbitration." General Declaration, General Principles ¶¶ A, B, 20 I.L.M. at 224. The United States agreed to release the Iranian assets within its jurisdiction that it had frozen after the hostage-taking occurred, *id.* at ¶¶ 4-6, 8, 20 I.L.M. at 225-27, and "to terminate all legal proceedings in United States courts

involving claims of United States persons and institutions against Iran." *Id.*, General Principles ¶ B. The United States agreed to "prohibit all further litigation based on such claims," and to bring about their resolution through binding arbitration, before the Iran-United States Claims Tribunal established under the Claims Settlement Declaration, Arts. I, II, 20 I.L.M. at 230-31.

In return, Iran agreed to place $1 billion of its repatriated financial assets in an escrow account in the Central Bank of Algeria, for the purpose of satisfying awards made against Iran by the Claims Tribunal. General Declaration, ¶ 7. Iran further agreed to maintain a minimum balance of $500 million in the escrow account until all such awards have been satisfied. *Id; see also Dames & Moore,* 453 U.S. at 664-65.

In addition to establishing the Claims Tribunal, the Algiers Accords specifically addressed any claims that the U.S. hostages might assert against Iran. In the General Declaration, the United States agreed to

> bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the embassy compound in Tehran after November 3, 1979, and (D) injury to the United States national or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran.

General Declaration, ¶ 11, 20 I.L.M. at 227. The United States also agreed to "bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by persons other than the United States nationals arising out of the events specified [above]." *Id.* In addition, these claims are expressly excluded from the jurisdiction of the Iran-United States Claims Tribunal. Claims Settlement Declaration Act, Art. II, 20 I.L.M. at 231.

III. Executive Order No. 12283 and Implementing Regulations

In order to implement the Algiers Accords, President Jimmy Carter issued a series of Executive Orders on January 19, 1981, the last day of his term in office. Exec. Order Nos. 12276-12285, 46 Fed. Reg. 7913-7932 (Jan. 19, 1981). President Ronald Reagan ratified those orders by Executive Order No. 12294 on February 24, 1981. 46 Fed. Reg. 14111 (Feb. 24, 1981).

Executive Order 12283 is entitled, "Non-Prosecution of Claims of Hostages and for Actions at the United States Embassy and Elsewhere." 46 Fed. Reg. 7927 (Jan. 19, 1981). That Executive Order states that as reflected in the Algiers Accords, and to begin the process of normalization of relations between the United States and Iran:

The Secretary of the Treasury shall promulgate regulations:

> (a) prohibiting any person subject to U.S. jurisdiction from prosecuting in any court within the United States or elsewhere any claim against the Government of Iran arising out of events occurring before the date of this Order relating to

> (1) the seizure of the hostages on November 4, 1979,
>
> (2) their subsequent detention,
>
> (3) injury to United States property or property of United States nationals within the United States Embassy compound in Tehran after November 3, 1979, or
>
> (4) injury to United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran;
>
> (b) prohibiting any person not a U.S. national from prosecuting any such claim in any court within the United States;
>
> (c) ordering the termination of any previously instituted judicial proceedings based upon such claims; and
>
> (d) prohibiting the enforcement of any judicial order issued in the course of such proceedings.

Id. at 1-101. Furthermore, Executive Order 12283 granted the Attorney General the authority to "take all appropriate measures to notify all appropriate courts of the existence of this Order and implementing regulations and the resulting termination of litigation." *Id.* at 1-102.

Pursuant to this directive, the Treasury Department promulgated regulations on February 26, 1981 that state:

> [p]ersons subject to the jurisdiction of the United States are prohibited from prosecuting in any court within the United States or elsewhere . . . any claim against the Government of Iran

> arising out of events occurring before January 19, 1981 relating to:
>
> (1) The seizure of the hostages on November 4, 1979; [or]
>
> (2) The subsequent detention of such hostages
>
> . . .

31 C.F.R. § 535.216(a).

IV. Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act ("FSIA") generally grants foreign states immunity from liability in United States courts. *See* 28 U.S.C. § 1602 *et seq.* Congress has created several specific exceptions to this immunity. This Court lacks jurisdiction over any claim against a foreign government unless one of these exceptions is met. As the Supreme Court has explained, a "foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson,* 507 U.S. 349, 355, 113 S. Ct. 1471 (1993).

V. Federal Anti-Terrorism and Effective Death Penalty Act

The 1996 Antiterrorism Act created a specific exception to the FSIA and thereby waived foreign sovereign immunity for certain state-sponsored terrorist acts. Pub. L. 104-132 (codified at 28 U.S.C. §1605(a)(7)). Foreign sovereign immunity is waived under the Antiterrorism Act if plaintiffs establish the following:

> 1) personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage taking;
>
> 2) the act was either perpetrated by a foreign state directly or by a non-state actor which receives material support or resources from the foreign state defendant;
>
> 3) the act or provision of material support or resources is engaged in by an agent, official, or employee of the foreign state while acting within the scope of his or her office, agency, or employment;
>
> 4) the foreign state has been designated as state sponsor of terrorism
>
> 5) if the incident occurred within the foreign state defendant's territory, that the plaintiff offered the defendants a reasonable opportunity to arbitrate the matter;
>
> 6) either the plaintiff [sic] of the victim was a United States national at the time of the incident;

28 U.S.C. §1605(a)(7); *see also* H.R. Rep. No. 383, 104th Cong., 1st Sess. 1995 at 137-138, available at 1995 WL 731698.

VI. The Flatow Amendment

Although the Antiterrorism Act waived the immunity of foreign states, questions remained as to what causes of action were available to plaintiffs who suffered at the hands of state-sponsored terrorism. *See Flatow v. Islamic Republic of Iran,* 999 F. Supp. 1, 12 (D.D.C. 1998). To resolve those questions, Congress enacted a separate

amendment to the FSIA later in 1996 that created a civil cause of action for acts that satisfy the requirements of the sovereign immunity waiver in 28 U.S.C. §1605(a)(7). That amendment took the form of an appropriations rider entitled the Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, §589, 110 Stat. 3009-172 (commonly known as "the Flatow Amendment").[1] As this Court reflected in *Flatow v. Islamic Republic of Iran*:

> In [the Flatow Amendment's sponsor's] experience as the Chairman of the House Task Force on Counterterrorism and Unconventional Warfare and member of the House National Security Committee, in order for the exception for immunity to have the desired deterrent effect, the potential civil liability for foreign states which commit and sponsor acts of terrorism would have to be substantial.

999 F. Supp. 1, 12 (D.D.C. 1998) (*citing* Congressman Jim Saxton, News Release, *Saxton to Flatow Family: "Be Strong, America is Behind You"* (February 26, 1997)).

The Flatow Amendment conditions civil liability on the six elements of the sovereign immunity waiver in the Antiterrorism Act at §1605(e)(7). *See* §1605 note.[2] In

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[1] The Flatow Amendment was named after Alisa Flatow, a United States citizen killed in Israel in 1995 by a suicide bomber connected with the Iranian government. The civil suit on behalf of her estate was the first case decided by this Court under the Antiterrorism Act and the Flatow Amendment. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C 1999).

[2] Although the Flatow Amendment was codified as a note rather than a separate statutory section, it has been interpreted as being an

(Continued on following page)

addition, the Flatow Amendment adds a seventh element to the private right of action:

> No action shall be maintained under this action [SIC] if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States.

Id.[3] Once those seven elements are established, a defendant shall be liable for "money damages which may include economic damages, solatium, pain and suffering, and punitive damages." *Id.*

VII. Procedural History of this Case

Plaintiffs commenced this action against the Islamic Republic of Iran on December 29, 2000. *See* Plfs' Complaint. On February 23, 2001, plaintiffs filed an amended complaint naming the Iranian Ministry of Foreign Affairs as a party-defendant. *See* Plfs' First Amended Complaint. The named plaintiffs are three former hostages and the wife and child of a former hostage, who brought the action on behalf of themselves and a class "comprising Americans

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"independent pronouncement of law." *Flatow,* 999 F. Supp. at 12-13; *see also Elahi,* 124 F.Supp.2d at 106.

[3] This Court has in the past described the seven elements as conditions of both sovereign immunity waiver and the private cause of action. *See, e.g., Elahi* 124 F.Supp.2d at 106; *Flatow,* 999 F. Supp. at 16. While these statutory provisions are less than the epitome of clarity, the plain language of the two provisions makes clear enough that the requirement that similar conduct by United States officials be actionable applies only to the civil cause of action, not to the immunity waiver.

taken hostage by defendants from the American Embassy or from the Foreign Ministry in Iran in 1979, their spouses, and their children who are victims of [d]efendants' conduct . . ." First Amended Complaint, ¶¶ 4-8, 11.

Plaintiffs' complaint alleges violations of the Antiterrorism Act, the Flatow Amendment, and the common law of the District of Columbia. Plaintiffs' common law claims include the torts of assault, battery, false imprisonment, intentional infliction of emotional distress, consortium, solatium, and unjust enrichment. The Islamic Republic of Iran and the Iranian Ministry of Foreign Affairs are named as defendants for their role in perpetrating the capture and imprisonment of members of the plaintiff class. The plaintiffs seek $33 billion dollars in compensatory and punitive damages.

The defendants were properly served in accordance with statutory procedures, *see* 28 U.S.C. §1608(a)(4). Despite service of process, defendants failed to make an appearance in this case. Consequently, after having certified the class on June 6, 2001, upon plaintiffs' request the Court entered a default judgment against defendants on August 17, 2001. The Court scheduled a trial for Monday, October 15, 2001 to determine the appropriate amount of damages.

VIII. United States' Intervention

On Friday, October 12, 2001, the Court was informed for the first time that the United States intended to file a motion to intervene. The Court immediately held a conference call with the plaintiffs' counsel and counsel for the United States to discuss this development. The Court

allowed the government to file its motions, and requested a preliminary response from plaintiffs by Sunday, October 14, 2001.

Late in the evening on October 12, 2001, the United States filed an Emergency Motion to Intervene and to Adjourn Hearing on Plaintiffs' Damages Pending Decision on the United States' Motion to Dismiss. The United States argued that it is entitled to intervene as of right under Federal Rule of Civil Procedure 24(a) because its interest in upholding the obligations of the Algiers Accords is implicated by this litigation, and alternatively, that the Court should grant permissive intervention. The United States also filed a Motion to Vacate Default Judgment and Dismiss Plaintiffs' Claims. In that motion, the United States argued that the default judgment on liability should be vacated for lack of subject matter jurisdiction because the exceptions to FSIA created by the Antiterrorism Act do not apply here because Iran was not designated as a state-sponsor of terrorism as a result of this hostage-taking. Further, the United States argued that upholding the commitments of the Algiers Accords justifies relief from the default judgment under Federal Rule of Civil Procedure 60(b)(6). Once the default judgment is vacated, argued the United States, the Court should dismiss plaintiffs' claims because the Court lacks jurisdiction, because plaintiffs' claims do not satisfy the elements of the Flatow Amendment, and are barred by the Algiers Accords.

Pursuant to the Court's request, plaintiffs submitted an initial response on Sunday, October 14, 2001 and objected to the United States' intervention as untimely and improper. On the morning of October 15, 2001, the Court declined to hear argument on the government's

filings, in light of the late hour of the attempted intervention and the considerable importance of the upcoming trial to the plaintiff witnesses. The Court set a briefing schedule for plaintiffs' response to the government motions, set a motions hearing date of December 13, 2001, and went forward with the trial. The Court heard the testimony of plaintiffs for two days.

On October 30, 2001, the Court ordered the parties to brief the following issue in their upcoming submissions:

> Did plaintiffs' counsel have a heightened duty to disclose to the Court any adverse controlling authority given the *ex parte* nature of the proceedings in this case? Did plaintiffs' counsel violate that duty to disclose, and if so, what is the appropriate action for the Court to take?

On November 5, 2001, plaintiffs filed a motion to strike the government's motion to intervene and motion to vacate and dismiss. Plaintiffs argued that the government had no authority to intervene and that the only proper status for the government under 28 U.S.C. §517 is as amicus curiae. On November 16, 2001, plaintiffs filed their oppositions to the United States' motions. Once again plaintiffs challenged the United States' intervention as untimely and improper. The plaintiffs also argued that the government lacked standing to raise a defense on the merits to plaintiffs claims against Iran, that the Algiers Accords provides no defense to Iran, and that the Algiers Accords does not trump statutes passed by Congress. Finally, plaintiffs counsel argued that they did reveal to the Court the only precedent from this Circuit that refers to the Algiers Accords as a potential bar to plaintiffs recovery, the *Persinger* case. *Persinger v. Islamic Republic Iran,* 729 F.2d 835 (D.C. Cir. 1984). Furthermore, plaintiffs were not

obligated to disclose the Algiers Accords and their implementing regulations because, they argued, they have been abrogated by the 1996 Anti-terrorism Act and therefore are not controlling authority.

IX. Subsection 626(c) of the 2002 Justice, Commerce, and Treasury Appropriations Act

On November 28, 2001, the Court was informed that the President had signed into law H.R. 2500, 107th Cong., 1st Sess., the 2002 appropriations act for the Departments of Justice, Commerce, and Treasury. Pub. L. 107-77, 115 Stat. 748 (2001). Subsection 626(c) of that act contained a substantive amendment to the FSIA which provides, in full:

> Amend 28 U.S.C. §1605(a)(7)(A) by inserting at the end, and before the semicolon, the following: "or the act is related to Case Number 1:00CV03110 (ESG) [sic] in the United States District Court for District of Columbia."

The Conference Committee Report that accompanied H.R. 2500 contained the following language with respect to subsection 626(c):

> [s]ubsection (c) quashes the State Department's motion to vacate the judgment obtained by plaintiffs in Case Number 1:00CV03110 (ESG) [sic] in the United States District Court for the District of Columbia. Consistent with current law, subsection (c) does not require the United States Government to make any payments to satisfy the judgment. The House bill did not contain a provision on this matter.

H.R. Conf. Rep. No. 278, 107th Cong., 1st Sess. at 170 (2001).

Subsection 626(c) was not included in the versions of the appropriations bills that were passed in the Senate and House of Representatives. Rather, it first emerged in conference as a replacement for language in the Senate bill that would have made plaintiffs eligible for payment of any judgment awarded in this case from the U.S. Treasury. As an amendment added in conference, it was never the subject of hearings or floor debate. After the Conference Committee agreement was reported, H.R. 2500 passed the House and Senate, also without any debate on §626(c). *See* 147 Cong. Rec. H8144-H8159 (Nov. 14, 2001); 147 Cong. Rec. S11878-S11886 (Nov. 15, 2001). Upon signing H.R. 2500 into law on November 28, 2001, the President included the following in his signing statement:

> [S]ubsection (c) . . . purports to remove Iran's immunity from suit in a case brought by the 1979 Tehran hostages in the District Court for the District of Columbia. To the maximum extent permitted by applicable law, the executive branch will act, and encourage the courts to act, with regard to subsection 626(c) of the Act in a manner consistent with the obligations of the United States under the Algiers Accords that achieved the release of the U.S. hostages in 1981.

Statement by the President, November 28, 2001, *available at* 2001 WL 1509507 (White House).

The Court ordered the parties to further brief the impact of this new law and heard oral argument on December 13, 2001. At that hearing, the Court expressed its concern for the lack of clarity of the recent Congressional enactment and the significance of the arguments made by

the United States. The Court took the case under advisement, and directed the parties to inform the Court of any further Congressional developments.

X. Section 208 of the 2002 Defense Appropriations Act

In late December 2001, Congress acted yet again with respect to this case. On December 20, 2001, Congress passed, and on January 10, 2002, President Bush signed into law, the Department of Defense and Emergency Supplemental Appropriations Act, Pub. L. 107-117, 115 Stat. 2230. Section 208 of this Act provides, in full, that "Section 626(c) of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 2002 (Public Law 107-77) is amended by striking '1:00CV03110 (ESG)' and inserting '1:00CV03110 (EGS).'" While the statutory text contained only this technical amendment to this Judge's initials, the Joint Explanatory Statement issued by the Conference Committee to accompany the report of the final bill to both Houses of Congress, included the following language:

> Sec. 208. – The conference agreement includes Section 208, proposed as Section 105 of Division D of the Senate bill, making a technical correction to Section 626 of Public Law 107 77. The language included in Section 626(c) of Public Law 107-77 quashed the Department of State's motion to vacate the judgment obtained by plaintiffs in Case Number 1:00CV03110 (EGS) and reaffirmed the validity of this claim and its retroactive application. Nevertheless, the Department of State continued to argue that the judgment obtained in Case Number 1:00CV03110 (EGS) should be vacated after Public Law 107-77 was enacted. *The provision included in Section*

> *626(c) of Public Law 107-77 acknowledges that, notwithstanding any other authority, the American citizens who were taken hostage by the Islamic Republic of Iran in 1979 have a claim against Iran under the Antiterrorism Act of 1996 and the provision specifically allows the judgment to stand for purposes of award [sic] damages consistent with Section 2002 of the Victims of Terrorism Act of 2000* (Public Law 106-386, 114 Stat. 1541).

H.R. Cong. Rep. 107-350 at 422-23 (emphasis added).[4] Upon signing the Act into law, President Bush expressed his opinion that Section 208 makes a

> technical correction . . . but does nothing to alter the effect of that provision or any other provision of law. Since the enactment of sub-section 626(c) and consistent with it, the executive branch has encouraged the courts to act, and will continue to encourage the court to act, in a manner consistent with the obligations of the United States

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[4] The parties disagree as to whether this Joint Explanatory Statement was part of the "Conference Report" that was officially voted on by the House and Senate when they approved the bill for the President's signature. However, the language preceding the Joint Explanatory Statement clearly explains the relationship: "[t]he managers on the part of the House and the Senate at the conference . . . submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the *accompanying* conference report." H.R. Conf. Rep. 107-350, at 129 (emphasis added). Thus, whatever the appropriate level of deference this Court should give to the explanation of a conference committee, plaintiffs' attempt to lend the language in the Statement the additional weight of the approval of the members of Congress who passed the accompanying bill is unpersuasive.

> under the Algiers Accords that achieved the release of U.S. hostages in 1981.

Govt's Supp. Resp. of 1/29/02, Ex. 46.

Just prior to a scheduled status hearing on January 14, 2002, plaintiffs informed the Court of this latest development, and the Court ordered further briefing on the subject. Plaintiffs argue that both the recent legislative enactments provide jurisdiction and a cause of action for plaintiffs, as they demonstrate a clear intent to abrogate the Algiers Accords. The government concedes that subsection 626(c) provides this Court with jurisdiction to hear plaintiff's claims, but that the Algiers Accords continue to provide a substantive bar to plaintiffs' action against the government of Iran because Congress has not expressly abrogated that agreement.

Section 208 was not the only additional Congressional reaction to this case. On December 20, 2001, Senator Harkin introduced S.1877, 107th Cong., 1st Sess. (2001), a bill providing the following:

> Cause of Action: Notwithstanding the Algiers Accords, any other international agreement, or any other provision of law, a former Iranian hostage or immediate relative shall have a cause of action for money damages against the Government of Iran for the hostage taking and any death, disability, or other injury (including pain and suffering and financial loss) to the former Iranian hostage resulting from the former Iranian hostage's period of captivity in Iran.

147 Cong. Rec. S13965, S13966 (Dec. 20, 2001). In addition to creating a cause of action, the bill also contains a section providing jurisdiction notwithstanding the Algiers

Accords, and definitions of the Accords, "former Iranian hostage," "immediate relative," and "period of captivity." *Id.* Senator Harkin himself explained that he introduced this bill in response to this Court's

> reluctance to make a final judgment and to order the Government of Iran to pay damages unless the Congress takes further legislative action to clearly and irrefutably abrogate the Algiers Accords insofar as necessary to allow the Americans held hostage and their families to sue in federal court and recover damages from the Government of Iran.

Id. On January 31, 2002, plaintiffs provided the Court with a letter from Senator Harkin explaining to the Departments of Justice and State that his bill has been tabled in light of his belief that "there is no longer any need for the Congress to act on this legislation because it is superceded by the enactment of the clarification provision included in the FY 2002 Defense Appropriations Act. . . ." *See* Plfs' Reply of 1/31/02, Ex. C.

On February 20, 2002, this Court once again heard oral argument on the legal significance of these recent developments, and once again took the case under advisement. On February 22, 2002, plaintiffs filed a supplemental brief with the Court, attempting to respond to a question posed by the Court to counsel at the February 20, 2002 hearing. Despite the fact that plaintiff's filing raised new legal arguments after over four months of ongoing briefing, the Court felt it necessary to issue one final request for further briefing by the parties on the legal standard for abrogation of an international executive agreement. That briefing was completed on March 14, 2002.

DISCUSSION

I. United States' Motion to Intervene

A. Intervention as of Right

The United States has the right to intervene in this lawsuit pursuant to Federal Rule of Civil Procedure 24. The United States has a sufficient cognizable interest in the outcome of this litigation, its intervention was timely, its interest could be impaired by the outcome of this litigation, and no party sufficiently represents that interest. Fed. R. Civ. P. 24(a); *Smoke v. Norton,* 252 F.3d 468, 471 (D.C. Cir. 2001).

1. The United States Has Asserted a Cognizable Interest

The interest asserted by the United States is the "adherence to its commitments under the Algiers Accords," and "meeting its obligation to terminate legal proceedings that have been brought in contravention of an international legal agreement to which the United States is a party." Govt's Mem. in Supp. of Mot. to Int. of 10/12/01 at 16-17. This specific interest has been recognized by the D.C. Circuit as sufficient to justify intervention in actions against Iran in the past. *Persinger v. Islamic Republic* [sic] *Iran,* 729 F.2d 835, 837 (D.C. Cir. 1984); *Am. Int'l Group, Inc. v. Islamic Republic of Iran,* 657 F.2d 430, 433, 435-36 (D.C. Cir. 1981). In addition to the interest in adherence to its international commitments, the United States also has an undeniable interest in the enforcement of its laws, which include Executive Order 12283 and its implementing regulations, 31 C.F.R. § 535.216(a), both of which prohibit lawsuits arising out of the hostage taking at issue here. Both of these interests are sufficiently "cognizable" for purposes of Rule 24(a)(2).

Plaintiffs argue that the United States' intervention is improper because the United States "has no possibility of being cast in judgment as a defendant." Plfs' Mem. in Opp. to Int. of 11/16/01 at 14. This argument is devoid of merit. Intervention is not limited under Rule 24(a) to those who may be sued by plaintiff, but rather to those who can meet the four requirements of that Rule. Plaintiffs cite no precedent that supports this theory. On the contrary, courts often allow the United States to intervene in cases that implicate its interest but pose no threat of liability. *See e.g., Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991); *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989); *Fitzgerald v. Penthouse Int'l Ltd.*, 776 F.2d 1236 (4th Cir. 1985). *Persinger*, in which the D.C. Circuit allowed the United States to intervene to protect the very interest at stake here, is one such case. 729 F.2d at 837.

Plaintiffs then argue that the United States lacks a cognizable interest because Iran has waived all defenses by refusing to appear in this court, and therefore the United States lacks standing to assert defenses on behalf of Iran. Plfs' Mem. in Opp. to Int. of 11/16/01 at 15-19. Plaintiffs consistently mischaracterize the nature of the interest asserted by the United States. The United States is not seeking to vindicate Iran's interests, but rather its own commitment under a binding international agreement, and its ever-present interest in the enforcement of its laws.

Finally, plaintiffs rely on *Sea Hunt, Inc. v. Unidentified Vessel or Vessels* to argue that the United States' interests in the enforcement of the Algiers Accords and their implementing regulations are not sufficient to

warrant intervention. 22 F.Supp.2d 521 (E.D. Va. 1998); Plf's Mem. in Opp. to Int. of 11/16/01 at 18, 20. In *Sea Hunt,* after the district court granted plaintiff exclusive salvage rights, the United States sought to intervene to assert Spain's claim of ownership on behalf of Spain. *Id.* at 522. The district court observed that the United States took the "unique position ... of holding itself out as counsel for Spain." *Id.* at 522-523. That court held that the relevant treaty with Spain did not provide the authority for such intervention.

The scenario addressed by *Sea Hunt* differs in several significant aspects from this case. First, the Court in *Sea Hunt* held that the United States' treaty obligations to Spain could be served sufficiently by allowing Spain to appear in United States courts. In contrast, the Algiers Accords expressly place an affirmative obligation on the United States "to bar and preclude" the prosecution of cases against Iran. Furthermore, Executive Order 12283 granted the Attorney General the specific authority to "take all appropriate measures to notify all appropriate courts of the existence of this Order and implementing regulations and the resulting termination of litigation." 46 Fed. Reg. 7927 (Jan. 19, 1981) at 1-102. Finally, in contrast to *Sea Hunt,* regardless of the plaintiffs' assertions to the contrary, the United States has not sought to intervene on behalf of Iran, but rather to uphold its international obligations and its interest in enforcing its own laws.

2. The United States' Motion to Intervene was Timely

Plaintiffs strenuously object to the United States' motion to intervene as untimely. However, as the D.C. Circuit has explained, "the relevant time from which to

assess [the] right of intervention is when [the applicant] knew or should have known that any of its rights would be directly affected by the litigation." *Nat'l Wildlife Federation v. Burford,* 878 F.2d 422, 433-34 (D.C. Cir. 1989), *rev'd on other grounds,* 497 U.S. 871 (1990). The appropriate starting point for the timeliness inquiry is not the date that the would-be intervener became aware of the existence of the litigation, but the date the intervener became aware of the implications of the litigation. *See United Airlines, Inc. v. McDonald,* 432 U.S. 385, 394 (1977) (post-judgment motion for intervention timely despite intervener's awareness of litigation where it became clear that named representatives would not adequately represented [sic] unnamed class members on appeal); *see also Smoke v. Norton,* 252 F.3d at 470-71 (holding that a post-judgment motion for intervention was timely when applicant promptly moved for intervention after it learned that government would not appeal from district court's adverse ruling and thus no longer adequately represented the movant's interests.).

The United States moved for intervention less than 30 days after the responsible officials within the State Department became aware that the United States' interest in upholding the Algiers Accords was threatened by this litigation. Plaintiffs have argued that certain employees of the federal government were made aware of this lawsuit as early as February of 2001. *See* Plf's Mem. in Opp. to Int. of 11/16/01 at 4-8. Plaintiffs have not, however, presented any evidence to dispute the United States' claim that the relevant officials in the State Department became aware of the nature of this suit only in September of 2001. *See* Govt's Mem. in Supp. of Mot. to Int. of 10/12/01, Ex. 5; Govt's Reply Mem. in Supp. of Mot. to Int. of 11/28/01 at

4-11. The United States has submitted affidavits to support its claim that none of the individuals at various federal agencies to whom plaintiffs and plaintiffs' counsel allegedly mentioned this lawsuit was aware of the potential conflict with the Algiers Accords. Govt's Reply Mem. in Supp. of Mot. to Int. of 11/28/01, Ex. 9-22. Nor did any of those officials, including an employee at the CIA's Office of Public Affairs, two members of the CIA General Counsel's Office, a trial attorney from the Criminal Division of the Department of Justice, attorneys from the United States' Attorney's Office in Dallas, Texas, and others, have reason to be aware of the details of an international executive agreement between the United States and Iran signed in 1981.

Furthermore, plaintiff's citation to *NAACP v. New York,* 413 U.S. 345, 365 (1973) is unpersuasive. While the United States' October 12, 2001, motion to intervene in this case did threaten to disrupt the scheduled trial in this case on October 15, 2001, it did not threaten the availability of any relief for plaintiffs. Unlike *NAACP,* where a primary election was set to proceed on the basis of the district lines at issue in the lawsuit less than three months after the attempted intervention, *id.* at 357-58 n. 10, no impending outside factors serve to impact this Court's ability to award judgment. The Court in *NAACP* based its holding of untimeliness in part on the serious prejudice such intervention would cause the parties: "Granting the [NAACP's] motion to intervene possessed the potential for seriously disrupting [New York's] electoral process." *Id.* at 369; *see also NRDC v. Costle,* 561 F.2d 904, 908 (D.C. Cir. 1977) ("[e]ven if there was a delay in seeking intervention . . . a determination of timeliness would also have to weigh . . . whether that delay would

unfairly disadvantage the original parties.") Plaintiffs here have identified no such prejudice.

3. Impairment of United States' Interest

Denying the United States' request to intervene will lead to the impairment of its asserted interests in this case. The United States' asserted interest in this case is "adherence to its commitments under the Algiers Accords," and "meeting its obligation to terminate legal proceedings that have been brought in contravention of an international legal agreement to which the United States is a party." Govt's Mem. in Supp. of Mot. to Int. of 10/12/01 at 16-17. The United States assumed an affirmative duty under the Accords to intervene and terminate any legal proceedings that contravene the Accords. Denying the United States the ability to intervene to protect its obligations will certainly impair that affirmative obligation. More generally, the United States also seeks here to ensure its laws, including Executive Order 12283 and its implementing regulations, 31 C.F.R. §535.216(a), are enforced. Denying the United States the right to intervene will certainly undermine this interest, as no other party to this case seeks to enforce those laws.

4. Inadequate Representation

In order for the United States to be granted intervention of right under Rule 24(a), the United States must show only that the representation of its interests by other parties in the case may be inadequate. *NRDC v. Costle,* 561 F.2d at 911. The only party present in this litigation are plaintiffs. Plaintiffs adamantly oppose the position asserted by the United States, and certainly could not be

held to represent that position. Iran has chosen not to defend itself in this Court, and therefore could not be said to represent the United States' position.

Because it has demonstrated a cognizable interest in this case that no other party adequately represents, that could be impaired by the denial of intervention, and that was timely asserted, the United States has satisfied the requirements for intervention pursuant to Federal Rule of Civil Procedure 24(a).

B. Plaintiff's Motion to Strike

Plaintiffs' motion to strike the United States' motion to intervene as beyond the United States' statutory authority is wholly without merit. Plaintiffs argue that pursuant to 28 U.S.C. §517 the only permissible role for the United States in this litigation is as *amicus curiae.* To prove this point, plaintiffs rely on a multitude of cases in which the United States filed amicus briefs. *E.g., In re Austrian and German Holocaust Litigation,* 250 F.3d 156 (2d Cir. 2001); *Smith v. Socialist People's Libyan Arab Jamahiriya,* 101 F.3d 239 (2d Cir. 1997). Strikingly, *none* of the cases cited by plaintiffs indicated in any way that the United States is *limited* to filing an amicus brief or *precluded* from moving to intervene pursuant to Federal Rule of Civil Procedure 24(a).

Nothing in the language of §517 limits the United States' participation in any way:

> "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United

> States in a suit pending in a court of the United States . . ."

28 U.S.C. §517. The United States clearly has the authority pursuant to 28 U.S.C. §517 to move to intervene in a case should it believe that its interests are sufficiently implicated, and has done so on countless occasions. *E.g., Texas v. Mexico,* 462 U.S. 554, 562 (1983) (United States intervened to protect its interest in the Pecos River); *Crater Corp. v. Lucent Technologies, Inc.,* 255 F.3d 1361, 1370 (Fed.Cir. 2001) (United States intervened in patent infringement action to prevent disclosures that would adversely affect national security). Furthermore, the D.C. Circuit has allowed the United States to intervene to protect the very interest that is at stake here, the United States' obligations under the Algiers Accords. *See Persinger v. Islamic Republic of Iran,* 729 F.2d 835, 837 (D.C. Cir. 1984); *Am. Int'l Group Inc. v. Islamic Republic of Iran,* 657 F.2d 430, 433 (D.C. Cir. 1981). Indeed, Executive Order 12283 itself grants the Attorney General the specific authority to "take all appropriate measures to notify all appropriate courts of the existence of this Order and implementing regulations and the resulting termination of litigation." 46 Fed. Reg. 7927 (Jan. 19, 1981) at 1-102.

Plaintiffs also argue in their motion to strike that where the government faces no liability as a defendant, it can only participate in a lawsuit as amicus. Plfs' Mot. to Strike of 11/05/01 at 4. Once again, plaintiffs seem to have invented this limitation on the right to intervene out of whole cloth. As discussed above, the United States has often intervened in cases to protect its interests where it is not liable as a defendant. *E.g., Bareford v. Gen. Dynamics Corp.,* 973 F.2d 1138 (5th Cir. 1992); *Fitzgerald v. Penthouse Int'l Ltd.,* 776 F.2d 1236 (4th Cir. 1985). The only

question relevant to determining the permissibility of the United States' intervention is whether the United States has fulfilled the requirements of Federal Rule of Civil Procedure 24(a) or (b). It is striking that plaintiffs' motion *never* mentions this Rule.

II. United States' Motion to Vacate

Under Rule 60(b) of the Federal Rules of Civil Procedure, a court may relieve a party from a "final judgment, order or proceeding" for a variety of reasons, including error or mistake by the Court, because the "judgment is void," or "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(a) and (b)(4), (6). The United States has intervened in this case as a defendant and has moved to vacate this Court's August 17, 2001 judgment on liability on several grounds. This Court vacates that judgment both because it was entered in contravention of the requirements of the FSIA, and because the Court lacked jurisdiction over plaintiff's claims at the time judgment was entered.

A. This Court's Default Judgment on Liability is Vacated on Statutory Grounds.

Notwithstanding this Court's entry of a default on August 17, 2001, the FSIA mandates that a default judgment for a specific monetary amount may not be entered against a foreign state until plaintiffs have "establish [ed] [their] claim or right to relief by evidence that is satisfactory to the Court." 28 U.S.C. §1608(e). Thus, in order for a court to enter judgment against a foreign state, plaintiffs must put forth satisfactory evidence to support each element of their claim. *E.g., Elahi v. Islamic Republic of*

Iran, 124 F.Supp.2d 97, 100 n.3 (D.D.C. 2000). Hence, in previous cases brought against Iran under the cause of action created by the Flatow Amendment this Court has consistently held non-jury trials to hear testimony on the issue of liability as well as damages prior to the entry of judgment. *See Jenco v. Islamic Republic of Iran,* 154 F.Supp.2d 27 (D.D.C. 2001); *Sutherland v. Islamic Republic of Iran,* 151 F.Supp.2d 27 (D.D.C. 2001); *Anderson v. Islamic Republic of Iran,* 90 F.Supp.2d 107 (D.D.C. 2000); *Cicippio v. Islamic Republic of Iran,* 18 F.Supp.2d 62 (D.D.C. 1998). As of August 17, 2001, the Court had not yet received any evidence and testimony to support the elements of each of plaintiffs' claims. That evidence was not heard until the bench trial on October 15 and 16, 2001. Therefore, the Court's entry of default on liability on August 17, 2001 violated the express provisions of the FSIA. That default order is therefore invalid and is hereby vacated.

B. The Default Judgment on Liability Should Also be Vacated Because this Court Lacked Jurisdiction to Hear this Claim at the Time the Judgment Was Entered.

The default judgment entered on August 17, 2001 should also be vacated because at the time that judgment was entered on liability for the plaintiffs, this Court lacked jurisdiction to hear plaintiffs' claims.

1. Prior to the enactment of subsection 626(c), this Court lacked subject matter jurisdiction to hear plaintiffs' claims.

A judgment is void for purposes of Rule 60(b)(4) if the court that rendered it lacked subject matter jurisdiction

over the plaintiff's claim, and as such must be vacated by the court. *See, e.g., Robinson Eng'g Co. Pension Plan and Trust v. George,* 223 F.3d 445, 448 (7th Cir. 2000); *United States v. Forma,* 42 F.3d 759, 762 (2d Cir. 1994); *Von Dardel v. U.S.S.R.,* 736 F. Supp. 1, 8 (D.D.C. 1990) (court has "no alternative" but to vacate a default judgment entered without subject matter jurisdiction). Furthermore, plaintiffs' argument that the United States can not move to set aside the judgment because it is not a "party" to this lawsuit is now moot, as the Court has allowed the United States to intervene as a defendant. *See* Plf's Mem. in Opp. to Govt's Mot. to Vacate and Dismiss of 11/16/01, at 3-4. Rule 60 provides the proper procedural tool for an intervener to request relief from a prior judgment. *See, e.g., Dillard v. Baldwin County Comm'rs,* 225 F.3d 1271, 1282 (11th Cir. 2000); *U.S. v. Kentucky Util. Co.,* 927 F.2d 252, 255 (6th Cir. 1991); *Williams & Humbert, Ltd. v. W & H Trade Marks (Jersey) Ltd.,* No. 83-1905, 1988 WL 66213 (D.D.C. June 17, 1988) (granting intervener's Rule 60(b) to vacate final judgment).

This Court lacked subject matter jurisdiction to hear plaintiffs' claims when it entered judgment in August, 2001 because prior to subsection 626(c)'s amendment to FSIA in November 2001, plaintiffs could not prove all the elements required to meet the 1996 Anti-Terrorism Act's exception to Iran's sovereign immunity.[5] In particular, Iran

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[5] As will be explained below, the Algiers Accords themselves do not create a barrier to this Court's subject matter jurisdiction but rather constitute the substantive law of the case. In signing those Accords and agreeing to prevent suits arising out of the hostage-taking, the President did not interfere with Congress' exclusive power to determine the jurisdiction of federal courts; rather, the Algiers Accords go to the

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was not designated as a state sponsor of terrorism at the time of the 1979-1981 hostage taking or as a result of that hostage taking. The exception to foreign sovereign immunity created by the 1996 Antiterrorism Act specifically states:

> the court shall decline to hear a claim under this paragraph –
>
> (A) if the foreign state was not designated as a state sponsor of terrorism under [other specific federal statutes] at the time the act occurred, unless later so designated as a result of such act.

28 U.S.C. §1605(a)(7).

There is no dispute over the fact that Iran was not officially designated a state sponsor of terrorism under the specific federal statutes named in the Anti-terrorism Act, the Export Administration Act or the Foreign Assistance Act, at the time that plaintiffs were taken and held hostage. Iran was designated as a state sponsor of terrorism on January 23, 1984, three years after the hostages were released. *See* Dept of State, Office of the Secretary, Determination Pursuant to Section 6[j] of the Export Administration Act of 1979 – Iran, 49 Fed. Reg. 2836 (Jan. 23, 1984).

Plaintiffs contend that Iran was designated as a state sponsor of terrorism as a result of the hostage taking of 1979-1981. This argument is contradicted by State

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merits of plaintiff's claims. Therefore, this Court could not vacate the default judgment for lack of jurisdiction based on the Algiers Accords themselves.

Department documents contemporaneous to the designation. The government argues that Iran was designated as a state sponsor of terrorism for its support of terrorist activities around the world that occurred *after* the hostages' release. *See* Govt's Mem. in Supp. of Mot. to Vacate of 10/12/01 at 12. The March 1984 edition of the State Department Bulletin, which constitutes the "official record of U.S. foreign policy," states that Iran was designated as a state sponsor of terrorism "based on convincing evidence o[f] a broad Iranian policy of furthering terrorism *beyond its borders*." *Department of State Bulletin,* Vol. 84, No. 2084, 77 (March 1984); (Exhibit 8 to Govt's Mem. in Supp. of Mot. to Vacate of 10/12/01) (emphasis added). In addition, the *Cumulative Digest of the United States Practice in International Law,* prepared by the State Department's Office of Legal Advisor, states that Iran was designated "a[s] a result of [its] actions . . . *occurring subsequent to the Algiers Accords.*" Office of the Legal Advisor, United States Department of State, *Cumulative Digest of the United States Practice in International Law,* 1981-1988, Book III, 3023; (Exhibit 8 to Govt's Mem. in Supp. of Mot. to Vacate of 10/12/01) (emphasis added). Letters from the Assistant Secretary of State for Legislative and Intergovernmental Affairs, dated January 19, 1984, transmitted to the Speaker of the House of Representatives, the Senate Majority Leader, and other senior members of Congress add further support to this argument. Those letters explain that "[a] careful review of the facts and statements by the Government of Iran *over the last two years* shows convincing evidence of broad Iranian policy furthering terrorism *beyond its borders.*" Govt's Reply Mem. in Supp. of Mot. to Vacate of 11/28/01, Ex. 28. These letters make no reference to the seizure or detention of plaintiffs.

In response to the government's argument, plaintiffs make two arguments: first, that because the government did not appear at the evidentiary hearing the Court must accept plaintiff's evidence as uncontroverted, and second, plaintiff's testimonial evidence supports the fact that Iran was designated as a state sponsor as a result of the hostage-taking at issue here. The first of plaintiffs' arguments is easily dismissed. The issue raised by the government goes to subject matter jurisdiction of this Court, and in order to resolve that question this Court will appropriately review the public record that existed at the time the designation was made. Fed. R. Evid. 201(b).

During the bench trial, plaintiffs offered the testimony of a former hostage, Professor William Daugherty, to support their argument. *See also* Plfs' Mem. in Opp. to Govt's Mot. to Vacate of 11/16/01, at 18-19. Professor Daugherty testified that there was "no doubt" in his mind that the seizure and detention of the hostages from 1979 through 1981 was one of the reasons for the Secretary of State's decision to designate Iran on the list of terrorist nations in 1984. Transcript of Trial Proceedings, at 189. Upon further questioning of the Court, however, it became clear that at the time of that designation Professor Daugherty was an employee of the CIA, not the State Department. He admitted that he did not know what "went across the Secretary's desk," or to what extent the hostage-taking played a role in the Secretary's decision-making process. *Id.* at 185, 187, 195. He admitted that his "opinion" about the designation was based on "speculation." *Id.* at 199, 209-10. It is obvious from Professor Daugherty's testimony that he did not have personal knowledge of the matter and as such his testimony can not be competent evidence of the reasons for the Secretary of

State's designation. Fed. R. Evid. 602; *United States v. Burnett,* 890 F.2d 1233, 1240-41 (D.C. Cir. 1989).

The government has submitted sufficient evidence to demonstrate that Iran was not designated as a state sponsor of terrorism as a result of the hostage-taking at issue here. As a result, plaintiffs failed to establish one of the necessary elements of the exception to sovereign immunity created by the 1996 Anti-terrorism Act. At the time of the entry of a default judgment on liability, this Court had no basis to hold that the sovereign immunity of Iran had been waived. Therefore, that judgment is void.

2. Section 626(c) should not be applied retroactively to confer jurisdiction unless explicitly stated by Congress.

Reserving for now the question of whether the recent enactment of subsection 626(c) currently confers jurisdiction over plaintiffs claims on this Court, and assuming arguendo that it would, subsection 626(c) can not be applied retroactively to validate the August 17, 2001 liability default judgment because it does not contain an express statement of intent by Congress. In *Landgraf v. USI Film Prod. Inc.,* the Supreme Court stressed that "the presumption against retroactive legislation is deeply rooted in our jurisprudence," because of special concerns about the power of retroactive statutes to "sweep away settled expectations," and their use as "means of retribution against unpopular groups or individuals." 511 U.S. 244, 265-66 (1994). In light of this presumption, "[a] statute may not be applied retroactively . . . absent a clear indication from Congress that it intended such a result." *INS v. St. Cyr,* 121 S. Ct. 2271, 2288 (2001). Thus,

> [w]hen a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach . . . When . . . the statute contains no such express command, the court must determine whether the new statute would have retroactive effect . . . If the statute would operate retroactively, [the] traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 280. Jurisdictional statutes such as 626(c) are "as much subject to [the] presumption against retroactivity as any other." *Hughes Aircraft Co. v. United States,* 520 U.S. 939, 951 (1997).

Furthermore, the post-judgment retroactive imposition of jurisdiction by Congress raises serious separation of powers concerns. The Supreme Court held in *Plaut v. Spendthrift* that Congress' retroactive imposition of jurisdiction to reopen a case after final judgment for money damages was an impermissible encroachment by Congress into the sphere of the federal courts and violated Article III of the U.S.Constitution. 514 U.S. 211, 115 S. Ct. 1447 (1995); *see also National Coalition to Save Our Mall v. Norton,* 269 F.3d 1092 (D.C. Cir. 2001) (declining to find Article III violation when Congress made substantive amendment to law mid-litigation). Because this Court holds that subsection 626(c) does not apply retroactively, there is no need to resolve this particular Article III concern.

The text of subsection 626(c) says nothing about retroactive application. Applying subsection 626(c) to the default judgment on liability would, as in *Hughes Aircraft,*

"create[] jurisdiction where none previously existed," thereby substantively impacting legal rights. 520 U.S. at 951-52. Because there is no clear expression of legislative intent to apply this new jurisdictional statute to the default judgment at issue, such retroactive effect is improper.[6]

III. United States' Motion to Dismiss for Failure to State a Claim

In light of this Court's decision to allow the United States to intervene and to vacate the default judgment on liability, the Court now must turn to the United States' motion to dismiss this lawsuit for failure to state a claim upon which relief may be granted. The United States concedes that in light of Subsection 626(c)'s amendment to the FSIA, this Court now has subject matter jurisdiction to hear this case. The United States argues that despite the grant of jurisdiction, plaintiffs have failed to state a claim because no act of Congress unambiguously provides a cause of action against Iran and no act of Congress has clearly abrogated the Algiers Accords' substantive bar on this litigation. Plaintiffs respond that through the Antiterrorism Act, the Flatow Amendment, Subsection 626(c), and Section 208, Congress has clearly and definitively expressed its intent to allow this Court to proceed to judgment against Iran and to abrogate the Algiers Accords.

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[6] Contrary to plaintiffs' argument, the retroactivity provision of the Antiterrorism Act does not justify the retroactive application of subsection 626(c), as by its own terms that provision applies only to amendments made by the 1996 Anti-terrorism Act. Pub. L. 104-132, § 221(c).

A. Sovereign Immunity and Jurisdiction

Despite the United States' concession that Subsection 626(c) amends the FSIA so as to result in a waiver of Iran's sovereign immunity in this case, this Congressional action raises serious separation of powers concerns. While according to the terms of subsection 626(c) plaintiffs can now establish subject matter jurisdiction in this case, that act implicates Article III of the United States Constitution by issuing a legislative directive aimed directly and expressly at this Court.

Because, as discussed above, plaintiffs have not proven that Iran was designated as a state-sponsor of terrorism as a result of the hostage taking at issue here, prior to the enactment of subsection 626(c), Iran's sovereign immunity remained intact and this Court lacked subject matter jurisdiction to hear this case. However, by enacting subsection 626(c), Congress has amended the FSIA to remove that jurisdictional obstacle to plaintiffs' claims. Subsection 626(c) amends the FSIA to allow for a waiver of sovereign immunity not only when the state-sponsor designation results from the act at issue, but also for any acts related to this litigation. Therefore, plaintiffs no longer need to show that Iran was designated as a state-sponsor as a result of the acts at issue here, for Congress has created an exception to that requirement for these plaintiffs.

This legislative waiver of sovereign immunity is not rendered problematic by the Algiers Accords and its implementing Executive Order and regulations. Both the Supreme Court and the D.C. Circuit have held that the Algiers Accords's preclusion of litigation is not jurisdictional. *See Dames & Moore,* 453 U.S. at 685; *American*

International Group, 657 F.2d at 441; *Persinger,* 729 F.2d 835. The Algiers Accords are "substantive governing law" that extinguish claims arising out of the 1979 Revolution and hostage taking on the merits. *Dames & Moore,* 453 U.S. at 685. In so holding, both courts explicitly rejected arguments that the Algiers Accords represent an improper effort by the Executive Branch to define the jurisdiction of the federal courts. *Dames & Moore,* 453 U.S. at 685-86; *American Int'l Group,* 657 F.2d at 444. On the issue of whether the Algiers Accords go to jurisdiction or to the merits of the case both plaintiffs and the United States agree. *See generally* Govt's Mem. in Supp. of Mot. to Vacate; Plfs' Mem. in Opp. to Govt's Mot. to Vacate at 6, 13 (repeatedly referring to the Algiers accords as a "merits defense"). Because the Algiers Accords are not jurisdictional, but preclude claims on the merits, there is no direct conflict with the amendment's waiver of sovereign immunity, and therefore no need to address the question of abrogation with respect to jurisdiction. Thus, because plaintiffs have established the other elements required by the Antiterrorism Act, 28 U.S.C. §1605(a)(7), if subsection 626(c) is indeed a valid act by Congress, Iran's sovereign immunity would be waived and this Court would have jurisdiction to hear these claims.

However, the enactment of subsection 626(c) raises two serious separation of powers concerns.[7] First, by

[7] From the strength with which they emphasize the case-specific nature of these enactments throughout their briefs, plaintiffs seem oblivious to the serious constitutional concerns raised here. *See* Plfs' Supp. Br. of 1/22/02 at 13 ("This is the first time that a specific case has been placed in the statutory text of the Antiterrorism Act by Congress"); Rep. Br. of 1/29/02 at 2 ("The subsequent enactment of Section 626(c) by

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expressly directing legislation at pending litigation, Congress has arguably attempted to determine the outcome of this litigation. *See, e.g., United States v. Klein,* 80 U.S. 128, 141-44 (1871); *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 240, 115 S. Ct. 1447 (1995); *National Coalition to Save Our Mall v. Norton,* 269 F.3d 1092, 1096 (D.C. Cir. 2001). Second, by legislating no more broadly or narrowly than issues presented by this litigation, Congress has also implicated Article III of the United States Constitution. *See Robertson v. Seattle Audubon Society,* 503 U.S. 429, 441, 112 S. Ct. 1407 (1992); *National Mall,* 269 F.3d at 1097.

The first concern is not at all an easy one to resolve. It is clear that Congress may not legislate to reopen suits for money damages after judgment has been granted in order to change the outcome. *See Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 115 S. Ct. 1447 (1995). With respect to ongoing cases, precedent suggests that if Congress explicitly legislates a rule of decision without amending the underlying substantive law it violates the exclusive province of the judiciary. *United States v. Klein,* 80 U.S. 128, 141-44 (1871). The Constitution is not offended, however, when Congress alters the scope of a specific injunction that is subject to the ongoing supervision of a court. *See Miller v. French,* 530 U.S. 327, 120 S. Ct. 2246 (2000); *Pennsylvania v. Wheeling and Belmont Bridge,* 59 U.S. 421 (1855). However, as the D.C. Circuit recently

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Congress as a case-specific piece of legislation branded upon the face of [the Anti-terrorism Act]."); *Id.* at 3 ("Section 626(c) is not a law of wide application to many cases . . . Here, by Contrast, Congress legislated to clarify the law applicable to one case").

stated, "*Klein's* exact meaning is far from clear." *See National Mall,* 269 F.3d at 1096.

The application of these often opaque principles is further complicated by the unusual posture of this case. Here, Congress acted after both the entry of a default judgment on liability in favor of plaintiffs and a motion filed by the United States challenging the validity of that default judgment on several grounds, including a lack of subject matter jurisdiction. Arguably, by passing Subsection 626(c) and the later Section 208, Congress acted to grant jurisdiction, thereby attempting to eliminate the government's challenge to the default judgment,[8] and directing this Court to proceed to award damages. No previous case that this Court can uncover has addressed this situation.

The second Article III concern raised here is no easier to resolve. Even if this Court were to conclude that Congress did not act to direct the outcome of this case, a second, slightly different concern is raised when Congress amends underlying substantive law that applies to a pending case no more broadly or narrowly than the specific application at issue in that case. The Supreme Court recognized but declined to resolve this issue in *Robertson.* 503 U.S. at 441. In *Coalition to Save Our Mall,* the D.C. Circuit recently discussed this Article III concern, ultimately deciding that the specificity of law at issue there did not offend the Constitution. 269 F.3d at 1096.

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[8] However, the Court notes that lack of jurisdiction was only one of the arguments raised by the United States, which further complicates the analysis of congressional intent here.

The legislation at issue in this case is arguably more offensive to separation of powers principles than the legislation at issue in either *Robertson* or *National Mall*. The acts of Congress at issue in *Robertson* and *National Mall* were broader in scope and implication than the specific facts of those cases, and importantly, set legal standards that could be applied in future cases.

The statute at issue in *Robertson* stated that the timber management plans for certain national forests known to contain northern spotted owls were sufficient to meet the statutory requirements at issue in two ongoing cases challenging those plans and in so stating specifically named those cases. *Id.* at 1412. Plaintiffs in those cases charged the federal government with killing birds in violation of the Migratory Bird Treaty Act, 16 U.S.C. §703 ("MBTA"). Prior to the statute at issue, the MBTA required the government to prove that it was managing its lands so as to avoid killing or taking these birds. *Id.* The Court held that the statute at issue amended the MBTA to allow the government to prove either that it was managing its land so as to avoid killing birds, or in accordance with the standards set forth in the specified management plans. *Id.* This statute was broader in application than the immediate facts of the *Robertson* case – any future timber management activities challenged under the MBTA could be defended by invoking compliance with those new standards as well.

The statute at issue in *National Mall* was more narrow than that in *Robertson,* but still had application beyond the scope of the facts of the *National Mall* case. The plaintiffs attempted to enjoin the construction of the proposed World War II Memorial on the National Mall in

Washington, DC, for failure to comply with various statutes. Subsequent to the initiation of the lawsuit, Congress passed a statute that stated that the Memorial would be constructed expeditiously, and exempted agency decisions with respect to the Memorial from judicial review. *Id.* at 1093. The Court held that Congress had not impermissibly directed the outcome of pending litigation in violation of Article III, but instead had created a substantive rule of law. *Id.* at 1096. The Court then held that the level of specificity with which Congress had acted was "unobjectionable." *Id.* The statute at issue applied to any objections to the construction of the Memorial, which would include not just the *National Mall* case but any others that could be filed.[9]

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[9] The D.C. Circuit's rationale for finding this level of specificity unobjectionable arguably suggests that that Court would also find a statute that truly extends no further than the scope of one case to be equally unobjectionable. The Court explained:

> There is no independent objection that this Memorial-specific legislation violates some substantive constitutional provision limiting Congress's power to address a specific problem, such as the ban on Bills of Attainder or (in some instances) the Equal Protection clause. Indeed, the Coalition at oral argument conceded that the legislation would be constitutional had it been passed prior to their bringing suit. In view of Plaut, Miller v. French and Wheeling Bridge, we see no reason why the specificity should suddenly become fatal merely because there happened to be a pending lawsuit. This seems particularly sound where Congress is addressing a unique public amenity (or disamenity, depending on one's viewpoint), such as the Memorial or the bridge at issue in Wheeling Bridge.

269 F.3d at 1097. However, just as the Supreme Court was not directly faced with this question in *Robertson*, so to [sic] did the D.C. Circuit not

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In contrast, as plaintiffs have repeatedly stressed to this Court, by its own terms Subsection 626(c) relates only to this litigation. *See* Plf's Supp. Br. of 3/14/02 at 3 (referring to Congress' "case-specific legislation" that "emboss[es] this case upon the face of the Act"). Subsection 626(c) amends the FSIA to provide jurisdiction over acts "related to Case Number 1:00CV03110." Because plaintiffs are a class of individuals impacted by the hostage taking, there are no future cases that could raise claims under the Flatow Amendment arising out of the hostage-taking at the embassy in Tehran in November of 1979. This is the only case to which the new amendment could or will apply.

Furthermore, Congress' aim at this litigation is evidenced by what small amount of legislative history exists for its action. Congress frankly and problematically admitted that by this legislation they intended to "quash" the United States' motion to vacate the judgment. H.R. Conf. Rep. No. 278, 107th Cong., 1st Sess. at 170 (2001). Deciding the outcome of a motion in general, and quashing in particular, are uniquely judicial functions. *See* Black's Law Dictionary, (7th ed. 1999), (defining "quash" as "to annul or make void; to terminate 'quash an indictment,' 'quash proceedings'"). Had Congress directed this Court by the statutory text to take such an action, the violation of Article III would be plain.

Ultimately, this Court declines to resolve the question of whether Congress improperly and unconstitutionally intruded on the Article III power of the federal courts by

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need to resolve it in *National Mall*. So too will this Court decline to resolve this issue until it is squarely presented.

either attempting to determine the outcome of this case or by amending a law by reference to this litigation and no more broadly or narrowly than the facts of this case. This Court will not unnecessarily venture into the murky waters of *Klein* and its progeny. Nor will this Court go beyond the holdings of *Robertson* and *National Mall* to resolve the thus-far unanswered question of whether an amendment to substantive law that refers to litigation by name and can have future effect on no other cases violates Article III. The Court takes seriously the invalidation of a Congressional action on constitutional grounds, and will apply the "cardinal principle" of avoiding such a determination where it is possible to decide the case on other grounds. *Zadvydas v. Davis*, ___ U.S. ___, 121 S. Ct. 2491, 2498 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392 (1988).[10] Because this Court holds it can not interpret the statutes at issue to provide a cause of action against Iran, this Court need not pass on the constitutionality of subsection 626(c).

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[10] Furthermore, the Court notes that neither plaintiffs nor the United States are in a position to challenge the constitutionality of this law. Plaintiffs will not challenge the law because their case relies upon it. The United States is tasked with defending laws passed by Congress, and although it did discuss potential separation of powers concerns in its surreply brief filed December 7, 2001, it was only to demonstrate the potential problems with a position taken by plaintiffs. Therefore, in addition to the above concern with avoiding unnecessary constitutional questions, the Court also declines to resolve an unnecessary issue that has not been fully briefed by the parties.

B. Plaintiffs' Claims Must be Dismissed Because This Court can not Interpret These Statutes to Either Conflict with or Abrogate the Algiers Accords.

Plaintiffs do not have a cause of action against Iran because the Algiers Accords require that this suit be dismissed. The language of the FSIA, as amended by the 1996 Antiterrorism Act, the Flatow Amendment, Subsection 626(c), and Section 208, does not unambiguously create a cause of action against Iran. Because that statute is ambiguous, and because none of the legislation at issue here ever mentions the Algiers Accords in statutory text or legislative history, this Court can not interpret this legislation to implicitly abrogate a binding international agreement. Therefore this Court must dismiss plaintiffs' claims.

1. The Algiers Accords are Substantive Law that Bar Plaintiffs' Claims and Require Dismissal.

The President's authority to extinguish claims by U.S. nationals against foreign states when necessary to conduct the foreign affairs of the nation was made clear by the Supreme Court in *Dames & Moore v. Regan*. 453 U.S. 654, 679-84, 101 S. Ct. 2972 (1981); *see also American Int'l Group v. Islamic Republic of Iran,* 657 F.2d 430 (D.C. Cir. 1981); *Chas. T. Main Int'l v. Khuzestan Water & Power Authority,* 651 F.2d 800, 810-13 (D.C. Cir. 1981). *Dames & Moore* upheld President Carter's authority to enter into the Algiers Accords and the authority of Presidents Carter and Reagan to issue implementing Executive Orders and regulations. 453 U.S. at 686. While it would contravene Article III of the Constitution for the President to attempt to divest this Court of jurisdiction to hear a claim, the President may as a matter of substantive law eliminate a

cause of action against a foreign state by virtue of his authority in the realm of foreign affairs. *Id.* at 684-85 ("This case, in short, illustrates the difference between modifying federal court jurisdiction and directing courts to apply a different rule of law . . . The President has exercised the power, acquiesced in by Congress, to settle claims, and as such, has simply effected a change in the substantive law governing the lawsuit.").

The Algiers Accords are one such exercise of Presidential power.[11] The Algiers Accords between the United States and Iran specifically addressed any legal claims

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[11] *Dames & Moore* did not discuss the provision of the Algiers Accords at issue here, and upheld only the provisions of the Accords extinguishing certain claims against Iran arising out of economic harm caused by the Iranian Revolution and establishing binding arbitration for those claims in the Iran-United States Claims Tribunal. Any potential claims by hostages themselves were specifically excluded from the Tribunal's jurisdiction, and thus, there was no alternative forum provided for these claims. This Court notes that the *Dames & Moore* Court was clear to limit its holding to "only to the very questions necessary to decision of this case." 453 U.S. at 661. Further, the Supreme Court's decision that the provisions of the Algiers Accords at issue did not exceed the President's executive power by impermissibly assuming the legislative power was also clearly "buttressed by the fact that the means chosen by the President to settle the claims of American nationals provided an alternative forum." *Id.* at 687. However, despite extensive briefing by plaintiffs and the government in this case, plaintiffs have never raised a challenge to the Algiers Accords as exceeding the President's constitutional authority with respect to their claims. Because this issue has not been raised or briefed by plaintiffs, this Court will not *sua sponte* raise such a question of constitutional importance on their behalf. The Court takes very seriously the invalidation of executive action on Constitutional grounds, and the doctrine of constitutional avoidance is appropriately invoked here. *Zadvydas v. Davis*, ___ U.S. ___, 121 S. Ct. 2491, 2498 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392 (1988).

that the U.S. hostages might assert against Iran. In the General Declaration, the United States agreed to:

> bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran.

General Declaration, ¶ 11, 20 I.L.M. at 227. To implement this agreement, President Carter issued Executive Order 12283, entitled, "Non-Prosecution of Claims of Hostages and for Actions at the United States Embassy and Elsewhere." 46 Fed. Reg. 7927 (Jan. 19, 1981). Pursuant to that Executive Order, the Treasury Department promulgated regulations on February 26, 1981 that state:

> [p]ersons subject to the jurisdiction of the United States are prohibited from prosecuting in any court within the United States or elsewhere . . . any claim against the Government of Iran arising out of events occurring before January 19, 1981 relating to:
>
> (1) The seizure of the hostages on November 4, 1979; [or]
>
> (2) The subsequent detention of such hostages . . .

31 C.F.R. §535.216(a).

These prohibitions clearly apply to the claims raised by the plaintiff class here, and constitute the "substantive law" governing this case. *Dames & Moore,* 453 U.S. at 685; *American Intl. Group,* 657 F.2d at 441. Because plaintiffs are prohibited by Executive Order No. 12283 and its implementing regulations from prosecuting the very claims that they have brought against Iran in this lawsuit, they have failed to state a claim upon which relief can be granted. *American Int'l Group,* 657 F.2d at 441-42.

Plaintiffs have belatedly raised one challenge to the validity of the Algiers Accords in their response to this Court's request for further briefing on the impact of Section 208 on this case. *See* Plfs' Supp. Br. of 1/22/02 at 9-12. This challenge is beyond the scope of the Court's requested briefing, and appears very late in this case without any explanation for why plaintiffs failed to raise this issue when the Algiers Accords arguments were first made by the United States back in October of last year. In spite of the untimeliness of plaintiffs' argument, the Court will briefly address this challenge.

Specifically, plaintiffs argue the Algiers Accords resulted from Iran's "demanding of money from another government to stop inflicting pain and suffering upon its innocent citizens" and are therefore an unenforceable illegal contract. Plfs' Supp. Br. of 1/22/02, at 9-12. Whatever emotional appeal and rhetorical flourish this argument contains, it is absolutely without basis in law. Plaintiffs have failed here to even acknowledge the adverse Supreme Court precedent, *Dames & Moore,* 453 U.S. at 686, that upholds the Algiers Accords as an exercise of

the President's power.[12] Furthermore, the cases that are cited by plaintiffs in support of this argument relate to the law of contracts, not the power of the political branches of government to enter international executive agreements or treaties, and therefore are inapposite. Plfs' Supp. Br. of 1/22/02 at 11 (*citing Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 77, 102 S. Ct. 851 (1982) and *McMullen v. Hoffman,* 174 U.S. 639, 669-70, 19 S. Ct. 839 (1899)).

2. Recent Legislation Has Not Removed This Barrier.

The President's power to extinguish claims against foreign states via international agreements is not plenary. It is well established that Congress has the power to disagree with and overturn such action by the President. *See, e.g., Trans World Airlines v. Franklin Mint Corp.,* 466 U.S. 243, 252, 104 S. Ct. 243 (1984); *Cook v. United States,* 288 U.S. 102, 120, 53 S. Ct. 305 (1933). The debate at the heart of this case centers on the amount of clarity with which Congress must legislate in order to overturn such Presidential action. Upon review of precedent that discusses potential conflicts between previously-enacted treaties and international agreements[13] and subsequently-enacted legislation, the following principles of law emerge.

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[12] Once again, the Court notes that plaintiffs' challenge to the Algiers Accords is *not* based on the constitutional argument that the President exceeded his authority by assuming legislative power, but rather rests the argument that the deal struck by the President was the unconscionable product of extortion by the Iranian government.

[13] The Supreme Court has also made clear that there are no relevant differences between an international agreement for which Congress has delegated the authority to the Executive branch, and a treaty ratified by the Senate, for purposes of the standard for abrogation. *Trans World*

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When a court is presented with a statute and a previously-enacted international agreement that potentially cover the same legal ground, there are three possible relationships between the two: first, the statute can unambiguously fail to conflict with the agreement; second, the statutory language can be ambiguous, and one of its possible interpretations can conflict with the agreement; and third, the statute can unambiguously conflict with the agreement. With respect to the first situation, when a statute is unambiguous in its language and effect and does not conflict with an earlier international agreement, both the statute and agreement co-exist as valid law.

If a court is presented with the second situation, a conflict between one possible reading of an ambiguous statute and an earlier international agreement, that court must inquire into Congress' intent with respect to the abrogation of the international agreement prior to giving force to the statute. *See, e.g., Weinberger v. Rossi,* 465 U.S. 25, 32, 102 S. Ct. 1510 (1982) ("It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy,* 2 Cranch 64, 118, 2 L.Ed. 208 (1804), that 'an act of congress ought never to be construed to violate the laws of nations, if any other possible construction remains.'"). As the Supreme Court stated in 1884:

> [T]he court should be slow to assume that congress intended to violate the stipulations of a treaty, so recently made with the government of another country. 'There would no longer be any

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Airlines, 466 U.S. at 252; *Weinberger,* 456 U.S. at 32-35. Therefore this court will discuss precedent that addresses both treaties and international agreements.

> security,' says Vattel, 'no longer any commerce between mankind, if they did not think themselves obliged to keep faith with each other, and to perform their promises.' Book 2, c. 12 . . . in the case of statutes . . . the rule is well settled that repeals by implication are not favored, and are never admitted where the former can stand with the new act.

Chew Heong v. United States, 112 U.S. 536, 539, 265 S. Ct. 255 (1884). Without a clear expression of Congressional intent to abrogate an agreement, a court must not read an ambiguous statute to so abrogate, and must interpret the statute so as to avoid the conflict. *See, e.g., Trans World Airlines, Inc. v. Franklin Mint Corp.,* 466 U.S. 243, 252, 104 S. Ct. 1776 (1984) ("There is, first, a firm and obviously sound canon of construction against finding an implicit repeal of a treaty in ambiguous congressional action."); *Weinberger,* 456 U.S. at 32; *Cook v. United States,* 288 U.S. 102, 120, 53 S. Ct. 305 (1933); *Chew Heong v. United States,* 112 U.S. at 260. If and only if Congress' intent to abrogate is clear, may the court interpret the statute so as to conflict with and supercede the earlier agreement. *See, e.g., Cook,* 288 U.S. at 120 ("A treaty will not be deemed to have been abrogated or modified by later statute unless such purpose on the part of Congress has been clearly expressed.").

If, however, a court is presented with the third situation, when the unambiguous statutory text conflicts with an earlier treaty or international executive agreement, precedent of equally long-standing requires the later statutory provision to prevail. *See, e.g., Reid v. Covert,* 354 U.S. 1, 17, 77 S. Ct. 1222 (1957); *Whitney v. Robertson,* 124 U.S. 190, 191, 8 S. Ct. 456 (1888); *Committee of United States Citizens Living in Nicaragua v. Reagan,* 859 F.2d

929, 936-37 (D.C. Cir. 1988); *South African Airways v. Dole,* 817 F.2d 119, 126 (D.C. Cir. 1987). Furthermore, if the text of the later statute is unambiguous, that statute is legally binding *regardless* of Congress' intent to abrogate the earlier treaty or agreement. *See, e.g., South African Airways,* 817 F.2d at 126. As the Supreme Court explained in 1889:

> [I]f congress has this power it is wholly immaterial to inquire whether it has, by the statute complained of, departed from the treaty or not; or, if it has, whether such departure was accidental or designed; and, if the latter, whether the reasons therefor were good or bad.

Chae Chan Ping v. United States, 130 U.S. 581, 602-603, 9 S. Ct. 623 (1889).

At first blush the language in cases such as *Weinberger,* 465 U.S. at 32, and *Trans World Airlines,* 466 U.S. at 252, that the Supreme Court will not interpret a statute to abrogate a treaty absent a clear expression of Congressional intent to do so appears to conflict with the *lex posterior* principle reflected in *Whitney,* 124 U.S. at 191, and *South African Airways,* 817 F.2d at 126. However, closer examination of these two lines of precedent reveals no conflict. While no court has explicitly discussed this relationship, the distinction turns on the clarity of the legislation at issue. Courts rely on *Whitney* when a statute is unambiguous. *See, e.g., Reid,* 354 U.S. at 17; *Committee of United States Citizens Living in Nicaragua,* 859 F.2d at 936-37; *South African Airways,* 817 F.2d at 126; *Diggs v. Shultz,* 470 F.2d 461, 465-67 (D.C. Cir. 1972). In contrast, the Supreme Court cases in which the Court examines Congressional intent with respect to abrogation all involved interpretations of ambiguous Congressional action.

See, e.g., Trans World Airlines, 466 U.S. at 252; *Weinberger,* 456 [sic] U.S. at 32. This distinction explains why no court has ever held there to be a conflict between, for example, the Supreme Court's statement in *Cook* that "[a] treaty will not be deemed to have been abrogated or modified by later statute unless such purpose on the part of Congress has been clearly expressed," 288 U.S. at 120, and in *Reid,* that "when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." 354 U.S. at 17.

The United States argues that this case presents the first of the situations described above. As will be more fully explained below, the United States reads the plain text of the statute and amendments at issue here as limiting plaintiff's cause of action to the officials, officers, and agents of the Iranian government, rather than a suit against the government itself. Because the statutes provide no cause of action against Iran, argues the government, there is no conflict with the Algiers Accords presented to this Court. The plaintiffs argue in response that this case presents the third situation, an unambiguous statute that directly conflicts with the Algiers Accords. Plaintiffs contend that the statutes at issue here clearly and unambiguously create a cause of action against Iran, and pursuant to the *Whitney* line of cases, supercede the earlier Algiers Accords.[14] Neither argument is correct. This

[14] Plaintiffs adopted this argument only at the very end of over four months of nearly continuous briefing and repeated oral arguments. Prior to their February 22, 2002 filing with the Court, in which they identified the *Whitney* and *South African Airways* cases for the first time, plaintiffs argued that the question presented to the Court was whether Congress sufficiently expressed its intent to abrogate the

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case actually presents the second situation. This Court is faced with an arguably ambiguous statutory scheme, one interpretation of which provides a cause of action against Iran and conflicts with the Algiers Accords. This Court may therefore allow plaintiffs to proceed against Iran only if Congress has adequately expressed the requisite clear intent to abrogate the Algiers Accords.

a. No Act of Congress Unambiguously Creates A Cause of Action for Plaintiffs Against Iran.

The statute at issue in this case, the FSIA, as amended by the 1996 Anti-terrorism Act, the Flatow Amendment, Subsection 626(c) and Section 208, is less than clear with respect to whether it provides a cause of action for plaintiffs against Iran. As explained above, the FSIA is generally a jurisdictional statute; it waives the sovereign immunity of foreign governments in United States' courts only if the conditions of certain specific exceptions are fulfilled. Section 1605(a) of the FSIA states,

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Accords, and that the legislative history of Subsection 626(c) and Section 208 was sufficient evidence of that intent. The argument that this Court need not inquire into Congressional intent because the statutes at issue are unambiguous, while available to plaintiffs from the time that the United States entered this litigation, is thus rather new. Plaintiffs have given no explanation for their failure to discover these relevant cases or to raise this argument earlier. While the sands of plaintiffs' legal arguments have continued to shift, there has been no prejudice to either plaintiffs or the United States caused by the extensive and repeated rounds of briefing here. While it was well within the Court's discretion to exclude plaintiffs' late-filed brief, for which plaintiffs never requested leave to file, the Court did not believe it would be in the interests of justice to prevent plaintiffs from making this argument because of their counsels' failure to adequately research the issues presented, and thus, once again, allowed for further briefing.

"a foreign state shall not be immune from the jurisdiction of courts of the United States or of the State in any case . . ." that meets the criteria established for the exceptions. One such exception to sovereign immunity was created in 1996 in the Anti-terrorism Act. That Act allowed federal courts to have jurisdiction over claims against foreign governments arising of state-sponsored terrorist activity. *See* Pub. L. 104-132 (codified at 28 U.S.C. §1605(a)(7)). What the 1996 Anti-terrorism Act did not do was create a private cause of action for the victims of state-sponsored terrorism. Like all the other exceptions to foreign sovereign immunity in the FSIA, victims of state-sponsored terrorism had to look to other laws to provide a cause of action against the foreign state. *See* §1605(a)(1)-(6).[15]

Congress recognized that although foreign sovereign immunity was waived by the 1996 Anti-terrorism Act, victims of state-sponsored terrorism that occurs beyond the borders of the United States may lack the requisite private cause of action to bring such a suit. *See Flatow v. Islamic Republic of Iran,* 999 F. Supp. 1, 12 (D.D.C. 1998).

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[15] For example, §1605(a)(2) waives foreign sovereign immunity when "action is based upon a commercial activity carried on in the United States by a foreign state." This provision does not provide the underlying private cause of action. §1605(a)(5) waives foreign sovereign immunity for actions for money damages arising out of a "tortious act or omission of that foreign state" occurring in the United States. This provision does not provide the substantive tort law upon which such a claim may be based. As far as this Court can discern, §1605(a)(7) is the only exception to FSIA to which Congress has attempted to append a private cause of action. *See, e.g., First National City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 620, 103 S. Ct. 2591 (1983) (FSIA is jurisdictional rather than substantive).

Thus, later in 1996, Congress passed yet another amendment to the FSIA, in the form of a rider on an appropriations act, entitled "Civil Liability for Acts of State Sponsored Terrorism," and commonly known as the Flatow Amendment. Pub. L. No. 104-208, §589, 110 Stat. 3009-172 (codified at §1605 note). It is mainly this provision on which plaintiff [sic] rest their claim to a private cause of action against Iran. However, the plain text of this appropriations rider does *not* create a cause of action against a foreign government that sponsors terrorism it creates a cause of action only against the "official, employee, or agent" of such a state who participates in the terrorist activity. The law states:

> An official, employee, or agent of a foreign state designated as a state sponsor of terrorism [under the appropriate statutes] while acting in the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) . . .

§1605 note. Further, Congress limited this cause of action to actions for which officials, employees, or agents of the United States, while acting within the scope of his or her office, employment, or agency would be liable for such acts if carried out within the United States. *Id.* The plain text of this statute appears to be unambiguous; the Flatow Amendment does not on its face create a cause of action against foreign states. This conclusion is supported further by another provision of the FSIA in which Congress actually recognized the difference between suing a state and suing an official. In the exception for tortious activity

within United States borders, the statute waives immunity for lawsuits arising out of "the tortious act or omission of that *foreign state or of any official or employee of that foreign state* while acting within the scope of his office or employment." §1605(a)(5) (emphasis added).

The implications of the plain text of this statute are not altered by the recent addition of Subsection 626(c) or Section 208. Plaintiffs argue that the FSIA as it has been amended by all these statutes, unambiguously creates a cause of action against the state of Iran. The Court can not find plaintiffs' alleged unambiguous mandate anywhere in the text of these statutes. Subsection 626(c) did not amend the portion of the FSIA created by the Flatow Amendment; it amended only the jurisdictional provision added by the 1996 Anti-terrorism Act. Nothing about Subsection 626(c) independently creates a cause of action against foreign governments. Nothing about Subsection 626(c) alters the language of the Flatow Amendment that provides for a cause of action against "official, employee, or agent of a foreign state." §1605 note. Furthermore, as explained above, Section 208 adds only a technical amendment to correct this Judge's initials in the case number referred to in Subsection 626(c), and creates no substantive law.

Plaintiffs make several unpersuasive arguments to support their claim that together these statutes unambiguously create a cause of action against Iran. First, plaintiffs rely heavily on several judgments issued by this Court against foreign governments for violations of the statute at issue here. *See Weinstein v. Islamic Republic of Iran,* Civ. No. 00-26-1 (RCL) (D.D.C. Feb. 6, 2002); *Simpson v. Socialist People's Libyan Arab Jamahiriya,* 180 F. Supp. 2d 78 (D.D.C. 2001); *Wagner v. Islamic Republic of Iran,* 172 F. Supp. 2d 128 (D.D.C. 2001); *Daliberti v. Republic of*

Iraq, 146 F. Supp. 2d 19 (D.D.C. 2001); *Elahi v. Islamic Republic of Iran,* 124 F. Supp. 2d 97 (D.D.C. 2000); *Price v. Socialist People's Libyan Arab Jamahiriya,* 110 F. Supp. 2d 10 (D.D.C. 2000); *Daliberti v. Islamic Republic of Iran,* 97 F. Supp. 2d 38 (D.D.C. 2000); *Cicippio v. Islamic Republic of Iran,* 18 F. Supp. 2d 62 (D.D.C. 1998); *Flatow v. Islamic Republic of Iran,* 999 F. Supp. 1 (D.D.C. 1998).[16] However, even if this Court ultimately agrees with these courts that the purpose and history of this legislation could support reading into this statute a cause of action against a foreign government, these cases in no way support plaintiffs' claim that the language of these statutes *unambiguously* requires such a conclusion. Indeed, the previous opinions by this Court demonstrate Congress' lack of clarity and the lengths to which this Court had to go to interpret these provisions consistently.

Second, plaintiffs argue that the United States' admission that Subsection 626(c) confers jurisdiction over this claim against Iran is equivalent to an admission that plaintiffs have a cause of action against Iran. Plf's Supp. Br. of 3/14/02 at 16. Plaintiffs argue that the elements of the jurisdictional waiver in §1605(a)(7), and of the cause of action created by the Flatow Amendment are the same.

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[16] None of these cases present the issue currently before this Court. In none of these cases did the United States move to intervene as a defendant to protect its interest in upholding the Algiers Accords, because these cases all involved terrorist activities unrelated to the 1979-1981 hostage-taking. Furthermore, all of these cases proceeded by way of default judgments, with only the plaintiffs' interpretations of the statute placed before the Court, and without the benefit of the adversarial process to put any pressure on those interpretations. Here, the Court benefits from the United States's adept demonstration of the flaws in plaintiff's interpretation of the statutes at issue.

While it is true that the Flatow Amendment incorporates the elements of §1605(a)(7) by requiring plaintiffs to fulfill the jurisdictional waiver in order to proceed, only the Flatow Amendment speaks to whom a plaintiff may proceed against. As discussed above, nothing in the elements of §1605(a)(7) requires or permits a cause of action against a foreign state,[17] and the plain language of the Flatow Amendment speaks only of a suit against individuals.

Plaintiffs next argue that the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1541 (2000), somehow makes the language of the amended FSIA unambiguous with respect to creating a claim against Iran. The Victims of Trafficking and Violence Protection Act of 2000 recognized the judgments issued by this Court against Iran in the cases referred to above, and provided for the payment of those judgments from the U.S. Treasury. It suffices to say that this 2000 Act in no way changes the plain text of the FSIA and in no way creates an independent action against Iran. Furthermore, while plaintiffs attempt to rely on this later recognition by Congress of these judgments as a reflection of Congressional intent, that intent is irrelevant to this Court's

[17] Plaintiff's argument that 1605(a)(7)'s inclusion of the language "a court shall decline to hear a claim under this paragraph if [naming conditions]" in the definition of one of the elements of the jurisdictional waiver somehow creates a cause of action is unpersuasive. Nothing in 1605(a)(7), including Congress' use of the word "claim," independently creates a cause of action. This reference to declining to hear a claim, when read in context, is referring to a court declining to hear a claim because it lacks jurisdiction.

inquiry into whether the statute relied upon by plaintiffs is unambiguous on its face.

Despite the fact that plaintiffs have always contended that they have a cause of action under the 1996 Anti-Terrorism Act and Flatow Amendment, plaintiffs now attempt to argue that they unambiguously have a cause of action against Iran by virtue of another provision of the FSIA, §1606. Raising this argument for the first time in a footnote in their most recently-filed brief, plaintiffs argue, relying on two previous opinions by this Court, that §1606 "renders foreign states liable 'in the same manner and to the same extent as a private individual under like circumstances.'" Plfs' Supp. Br. of 3/13/02 at 15 n. 8. However, the Supreme Court has made clear that this provision does not impact the substantive liability of a foreign government. *See First National City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 620, 103 S. Ct. 2591 (1983) ("The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state.")

Finally, plaintiffs argue that this Court must interpret these statutory provisions so as to avoid "absurdity or manifest injustice." Plfs' Supp. Br. of 3/13/02 at 7. Plaintiffs contend that reading these statutes to preclude a cause of action for plaintiffs would thwart the obvious intent of Congress, especially in light of the legislative history of Subsection 626(c) and Section 208, to allow plaintiffs to proceed with their claim against Iran. While plaintiffs' argument that the legislative purpose and history should be considered when interpreting and harmonizing these provisions is appealing, it also directly

undermines plaintiffs' contention that the statutory language is unambiguous. If this Court must resort to legislative history and purpose to provide an interpretation of these provisions that avoids an otherwise absurd result created by the plain text, then these provisions are hardly unambiguous. Therefore, the line of precedent beginning with *Whitney*, holding that unambiguous legislation supercede earlier treaties and agreements, does not stretch to this case.

The Court agrees that it is *possible* to read these statutory provisions, in the context of legislative history and intent, to provide for a cause of action against Iran. While all these pieces of legislation are less than the epitome of clarity, and their enactment via appropriations rider leaves this Court with scant legislative history to consider, the history that does exist does indicate an intent to allow plaintiffs to proceed with their claims against Iran. This Court will not go so far as to conclude that the text of the Flatow Amendment and Subsection 626(c), separated from any legislative history or intent, unambiguously precludes the cause of action here. However, the fact that an interpretation of these statutory provisions, when considered in the context of legislative intent and purpose, allowing plaintiffs to proceed against Iran is possible, does not end this Court's inquiry. Because these statutory provisions are at best ambiguous with respect to whether plaintiffs can sue Iran, if Congress has not expressed a sufficiently clear intent to abrogate the Algiers Accords, this Court *must* construe the statutes at issue to preclude such a suit. *Trans World Airlines,* 466 U.S. at 252; *Weinberger,* 465 U.S. at 32; *Cook,* 288 U.S. at 120.

b. Congress Did Not Express a Clear Intent to Abrogate the Algiers Accords When Passing These Ambiguous Statutes.

Because the statutes at issue here are ambiguous, this Court must not interpret these statutes to conflict with the Algiers Accords absent a clear expression of intent to abrogate that agreement by Congress. The canon of construction disfavoring an implicit repeal of treaty by an ambiguous congressional action is "firm and obviously sound," *Trans World Airlines,* 466 U.S. at 252, and is reflected in Supreme Court precedent of long-standing. *See, e.g., United States v. Lee Yen Tai,* 185 U.S. 213, 221, 22 S. Ct. 629 (1902) ("the purpose by statute to abrogate a treaty or any designated part of a treaty . . . must not be lightly assumed, but must appear clearly and distinctly *from the words used in the statute*") (emphasis added).

The Supreme Court has provided some guidance as to what it will accept and not accept as a clear expression of legislative intent in this context. The Supreme Court has unequivocally held that "legislative silence is not sufficient to abrogate a treaty," *Trans World Airlines v. Franklin Mint Corp.,* 466 U.S. 243, 252, 104 S. Ct. 243 (1984), or a bi-lateral executive international agreement. *See Weinberger v. Rossi,* 456 U.S. 25, 32, 102 S. Ct. 1510 (1982). When a later statute conflicts with an earlier agreement, and Congress has neither mentioned the agreement in the text of the statute nor in the legislative history of the statute, the Supreme Court has conclusively held that it can not find the requisite Congressional intent to abrogate. *Trans World Airlines,* 466 U.S. at 252; *Weinberger,* 456 U.S. at 32; *cf. Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 202-03, 119 S. Ct. 1187 (1999) (with respect to abrogation of Indian Treaties, "[t]here must be 'clear

evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.' ").

In response to an Order by this Court,[18] plaintiffs attempt to distinguish the *Weinberger* case by arguing that it involved only a question of statutory interpretation of the word "treaty," rather than a conflict between an international agreement and a statute. However, plaintiffs ignore the fact that in order to determine the proper interpretation of the word treaty in the statute at issue, the Court explicitly addressed whether there were sufficient indicia of Congress' intent to abrogate earlier international executive agreements. The Court found no mention of those agreements in the statute, or in the extensive legislative history, aside from one ambiguous statement by a sponsoring Senator. 456 U.S. at 34-35. Because Congress did not make sufficiently clear its intent to abrogate the earlier international agreements, the *Weinberger* Court refused to interpret the statute at issue in such a way so as to result in that abrogation.

Similarly, in *Trans World Airlines,* the Court held that the Warsaw Convention was not abrogated by later acts of Congress. 466 U.S. at 252. The Court emphasized that

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[18] *See* Court's Order of 11/30/01 directing plaintiffs, *inter alia,* to discuss the *Trans World Airlines* and *Weinberger* holdings. Remarkably, in arguing that the 1996 Antiterrorism Act abrogated the Algiers Accords, plaintiffs failed to cite or discuss either of these relevant Supreme Court cases, or any of the other abrogation cases discussed in this Opinion, until ordered to do so by the Court.

"[n]either the legislative histories of the Par Value Modification Acts, the history of the repealing Act, nor the repealing Act itself, make any reference to the Convention." *Id.* at 252. Plaintiffs attempt to distinguish *Trans World Airlines* by arguing that the Court held that there was no abrogation because "it could find no potential conflict with the Warsaw Convention in the legislative history of the currency legislation." Plfs' Surreply of 12/4/01 at 13. This is incorrect. Because the Court found an actual conflict between the Convention and an interpretation of later acts, it was required to conduct the abrogation inquiry into Congress' intent. In conducting that inquiry, the Court found no *references* to the Warsaw convention in the legislation or its history, and for that reason was unwilling to conclude that Congress intended to abrogate the Convention. *Trans World Airlines,* 466 U.S. at 252.

The United States argues that intent to abrogate an executive agreement must be found in the text of the statute itself. The Court agrees that there is language in Supreme Court cases that would support this position. *See United States v. Lee Yen Tai,* 185 U.S. 213, 221, 22 S. Ct. 629 (1902) ("the purpose by statute to abrogate a treaty or any designated part of a treaty . . . must not be lightly assumed, but must appear clearly and distinctly *from the words used in the statute*") (emphasis added.). However, in *Trans World Airlines* and *Weinberger,* the Court analyzed both statutory text and legislative history for references to the treaty and agreement at issue, before concluding that there were none. *See Trans World Airlines,* 466 U.S. at 252 ("[n]either the legislative histories of the Par Value Modification Acts, the history of the repealing Act, nor the

repealing Act itself, make any reference to the Convention"); *Weinberger,* 456 U.S. at 34-35. Thus, the precedent that specifically addresses Congress' power to abrogate treaties and executive agreements is unclear with respect to the proper role of legislative history in discerning Congressional intent.

Both the government and plaintiffs extensively discuss the various canons of statutory construction that generally apply when interpreting statutes vis a vis their legislative histories. The government correctly argues that where the plain language of statutory text is unambiguous, courts should not resort to legislative history to interpret that text except in "rare and exceptional circumstances." *Demarest v. Manspeaker,* 498 U.S. 184, 190 (1991); *see* Govt's Supp. Br. of 1/29/02 (*citing, e.g., Negonsott v. Samuels,* 507 U.S. 99, 104 (1993) and *United States v. Gonzales,* 520 U.S. 1, 6 (1997)). The government also argues that even if a court has a legitimate need to consult legislative history, it can never rely on that history to "inject an entirely new idea" into a statute that "is in no way anchored in the text of the statute." Govt's Supp. Br. of 1/29/02 (*quoting Gonzales,* 512 U.S. at 583). Plaintiffs respond that this Court should construe the various provisions of a statute in accordance with the intent of Congress in passing it, *citing United States v. McGoff,* 831 F.2d 1071, 1080 (D.C. Cir. 1987), and that this Court can refer to legislative history in order to avoid a result at odds with that intent, citing *Saddeh v. Farouki,* 107 F.2d 52, 58 (D.C. Cir. 1997).

Before resolving any disputes over which arguments accurately reflect the law and which canons may or may not apply here, the Court must make clear that those questions must be answered with respect to the particular

context of this case: an alleged congressional abrogation of an international executive agreement. The question of whether or not legislative history can be used to inform, clarify, augment, or even contradict the text of a statute when that statute potentially conflicts with a valid exercise of executive power in the realm of foreign affairs may or may not be resolved differently than in the context of interpreting a statute that does not raise such conflicts. The rules regarding abrogation are rules of statutory construction specific to this context, and any invocation of the general canons of construction must explain their applicability in this context. However, the Court need not resolve these disputes over the proper canons to apply in this case.

Were this Court faced with a case in which Congress had made its intent to abrogate the Algiers Accords clear in the legislative history of a statute that potentially conflicts with the Accords, then this Court would be faced with the difficult question of whether express legislative history can trump a silent statute in the context of executive agreement abrogation. However, that is not the case here. Just as in *Weinberger* and *Trans World Airlines,* neither the legislative history nor the statutory text express sufficient specific intent to overturn the Accords. Thus, the question of whether clear legislative history alone is sufficient to abrogate an international agreement is reserved for another day. Much of the dispute between plaintiffs and the government over the proper weight to be given the legislative history vis-a-vis the statutory text need not be resolved here, because the legislative history of none of the relevant statutes sufficiently express an intent to abrogate the Algiers Accords.

Finally, before turning to a discussion of the specific legislation, the Court must address one final argument raised by plaintiffs. Plaintiffs repeatedly argue that the legislative histories of these statutory provisions make clear Congress' intent to allow plaintiffs to proceed with their claim against Iran. Even if this accurately describes the intent of Congress, without an express recognition of the conflict between this claim and the Algiers Accords, or an acknowledgment of the existence of the Accords at all, Congress has failed to act with the clarity required for this Court to interpret these statutes as abrogating the Accords.

Neither the Anti-Terrorism Act, the Flatow Amendment, Subsection 626(c), or Section 208 contain the type of express statutory mandate sufficient to abrogate an international executive agreement. Furthermore, despite plaintiff's arguments to the contrary, the legislative histories of these statutes contain no clear statements of Congressional intent to specifically abrogate the Algiers Accords. Therefore, pursuant to Supreme Court holdings from *Lee Yan Tai* through *Weinberger* and *Menominee,* such legislative silence is conclusive. Unless and until Congress expresses its clear intent to overturn the provisions of a binding agreement between two nations that has been in effect for over twenty years, this Court can not interpret these statutes to abrogate that agreement.

i. The 1996 Anti-Terrorism Act Does Not Abrogate the Algiers Accords.

Until the passage of subsection 626(c), plaintiffs portrayed this case as a contest between the Antiterrorism Act and the Algiers Accords. Plaintiffs argued that "the conflict between the Algiers Accords and the Antiterrorism

Act . . . must be resolved in favor of Congress." *See* Plfs' Mem. in Opp. to Govt's Mot. to Vacate of 11/16/01 at 7. Plaintiffs argued that the Antiterrorism Act should trump the Algiers Accords for several reasons: first, "an executive agreement is meaningless if it conflicts with an Act of Congress." *Id.* at 6. Second, the Antiterrorism Act is more recent in time than the Algiers Accords. *Id.* at 7. Third, Congress very specifically defined "hostage-taking" and "torture" in the Antiterrorism Act to include the acts at issue in this case. *Id.* at 8. Fourth, that the Algiers Accords were not an implicit exception to the Antiterrorism Act. *Id.* Fifth, "the burden was upon the Executive Branch in 1996 to persuade Congress to exclude specific acts of terrorism, and they did not do so." *Id.* at 9. None of these arguments has merit.

Regardless of whether plaintiffs' arguments are a correct statement of the law on abrogation, the fundamental problem with plaintiffs' argument here is that plaintiffs assume a conflict between the Antiterrorism Act and the Algiers Accords. There is no conflict between the provisions of the Anti-Terrorism Act of 1996 and the Algiers Accords.

Both the Supreme Court and this Circuit have held that the Algiers Accords's preclusion of litigation is not jurisdictional. *See Dames & Moore,* 453 U.S. at 685; *American International Group,* 657 F.2d at 441; *Persinger,* 729 F.2d at 837. The Algiers Accords is "substantive governing law" that extinguishes claims arising out of the 1971 Revolution and hostage taking on the merits. *Dames & Moore,* 453 U.S. at 685. In so holding, both courts explicitly rejected arguments that the Algiers Accords represent an improper effort by the Executive Branch to define the jurisdiction of the federal courts. *Dames &*

Moore, 453 U.S. at 685-86; *American Int'l Group,* 657 F.2d at 444. On the issue of whether the Algiers Accords goes to jurisdiction or to the merits of the case both plaintiffs and the United States agree. *See See* [sic] Govt's Mem. in Supp. of Mot. to Vacate of 10/12/01; Plfs' Mem. in Opp. to Govt's Mot. to Vacate of 11/16/01 at 6, 13 (repeatedly referring to the Algiers accords as a "merits defense").

The Anti-Terrorism Act, on the other hand, is only about jurisdiction. The Anti-Terrorism Act amended the FSIA to waive sovereign immunity for state-sponsors of terrorism, thereby impacting subject matter jurisdiction. *See Elahi,* 124 F. Supp. at 106; *Flatow,* 999 F. Supp. at 12-13. The Act itself did not create a cause of action for the victims of terrorism, and indeed, plaintiffs here have had to look elsewhere, to the Flatow Amendment, to find one. Plfs' Pretrial Br. at 8. Thus, because the Anti-Terrorism Act is jurisdictional and the Algiers Accords go to the merits of plaintiffs' claim, this Court need not even reach the question of whether Congress intended for the Antiterrorism Act to abrogate the Algiers Accords.[19]

ii. The Flatow Amendment Does Not Abrogate the Algiers Accords.

Plaintiffs also turn to the Flatow Amendment to argue that the Algiers Accords have been abrogated. The Flatow Amendment to the FSIA created the cause of action

[19] Even had the Court inquired into legislative intent, once again, the text and legislative history of the 1996 Antiterrorism Act are silent with respect to the Algiers Accords. Legislative silence is insufficient to abrogate an international executive agreement. *Trans World Airlines,* 466 U.S. at 252; *Weinberger,* 456 U.S. at 32.

against state-sponsored acts of terrorism upon which plaintiffs attempt to rely. As discussed above, in contrast to the Anti-Terrorism Act itself, the application of the Flatow Amendment to this case does potentially conflict with the substantive provisions of the Algiers Accords. Plaintiffs have established the elements of a claim under the Flatow amendment,[20] and yet as discussed above, the statute is ambiguous as to whether that claim may be brought against the state of Iran rather than against its individual officers. Therefore, this Court must inquire into whether Congress expressed a sufficiently clear intent to abrogate the requirements of the Algiers Accords when it passed the Flatow Amendment.

The Flatow Amendment was passed as an appropriations rider. *See* Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, §589, 110 Stat. 3009-172. Nothing in the text or legislative history of the Flatow Amendment expressly refers to the Algiers Accords. Nothing in the text or legislative history reflects a conscious weighing of the conflict with the Accords and decision in favor of abrogation. As discussed above, such legislative silence is insufficient to abrogate the Algiers

[20] Until the passage of Subsection 626(c) the parties contested whether plaintiffs stated a claim under the Flatow Amendment because of the timing and cause of Iran's designation as a state-sponsor of terrorism. The government argued, and plaintiffs disagreed, that Iran was designated for acts other than the hostage-taking in 1979, and therefore plaintiffs could not satisfy the element requiring the designation to be the result of the act in question. Subsection 626(c), however, renders that debate moot. Subsection 626(c) amends the FSIA to create an exception for this litigation to the requirement the [sic] "as a result of" requirement for state-sponsor designation.

Accords. *Trans World Airlines,* 466 U.S. at 252; *Weinberger,* 456 U.S. at 32.

iii. Subsection 626(c) Does Not Abrogate the Algiers Accords

1) Text of Subsection 626(c)

The text of Subsection 626(c) contains no express reference to the Algiers Accords or its implementing Executive Order or regulations. It states only that the FSIA should be amended to insert "or the act is related to Case Number 1:00CV3100 (ESG) [sic] in the United States District Court for the District of Columbia." Whatever arguments plaintiffs may make regarding the meaning of this reference to this case number, one thing is clear: all of those arguments require inferences that this Court is not permitted to make under the precedent on abrogation. The text does not refer to the Algiers Accords by name or by description, and that is determinative. *Trans World Airlines,* 466 U.S. at 252; *Weinberger,* 456 U.S. at 32.

2) Initial Legislative History of Subsection 626(c)

Nor does the legislative history of this subsection 626(c) provide the requisite language sufficient to abrogate. The only legislative history of this appropriations rider at the time it was passed, is found in the Conference Committee Report:

> [s]ubsection (c) quashes the State Department's motion to vacate the judgment obtained by plaintiffs in Case Number 1:00CV03110 (ESG) [sic] in the United States District Court for the District of Columbia. Consistent with current law,

> subsection (c) does not require the United States Government to make any payments to satisfy the judgment. The House bill did not contain a provision on this matter.

H.R. Conf. Rep. No. 278, 107th Cong., 1st Sess. at 170 (2001). Once again, whatever arguments plaintiffs make as to the invocation of the number of this case and reference to the government's motion to dismiss, those arguments require inferences to reach any intent with respect to the Algiers Accords. The Accords are not mentioned by name or description. Such legislative silence with respect to the Accords is insufficient to abrogate a valid international agreement. *Trans World Airlines,* 466 U.S. at 252; *Weinberger,* 456 U.S. at 32.

Plaintiffs attempt to distinguish *Trans World Airlines* by arguing that the "legislative history of subsection 626(c) demonstrates Congress's familiarity with this case, with the government's effort to intervene to file a motion to vacate, and with the government's motion to vacate this Court's judgment." Plfs' Surreply of 12/4/01, at 14. Therefore, argue plaintiffs, Congress' intent to "reject these government efforts" was clear, and therefore, Congress' intent to abrogate the Algiers Accords was also clear. Contrary to plaintiffs' argument, however, the reference to the United States' motion in the legislative history on its face proves only Congress' awareness of the existence of the motion, and of the United States' attempt to vacate the judgement. Plaintiffs can not argue that it proves Congressional awareness or intent with respect to the particular *content* of that motion without impermissible inferences. This may seem a merely technical distinction, but in light of the Supreme Court precedent holding that legislative silence is insufficient to abrogate treaties and

international agreements, plaintiffs are asking the Court to draw an inference that it can not draw. In the realm of treaty and international agreement abrogation, Congress must make its actions explicit and clear.

The motion filed by the United States asked this Court to vacate the judgment and dismiss the case on several grounds, only one of which was the Algiers Accords' bar on litigation arising from the hostage taking. For example, the government argued that plaintiffs had not met the elements of the Anti-Terrorism Act's sovereign immunity waiver or the Flatow Amendment's cause of action, because Iran was not designated as a sponsor of terrorism as a result of the hostage taking at issue here. The government could have raised this argument irrespective of the Algiers Accords. In fact, the insertion of subsection 626(c) immediately after the requirement that the state-sponsor designation arise as a result of the terrorist act, if anything, indicates that Congress intended by subsection 626(c) to address that particular problem with jurisdiction in this case. Subsection 626(c) creates an exception to the "as a result of" requirement for the state-sponsor designation for this particular case. Without further guidance from Congress, including a specific reference to the Algiers Accords, this Court can not know which of the various arguments raised by the government was the target of Congressional objection.

Further, plaintiffs argue that Congress' intent to abrogate the Algiers Accords is clear from Congress' reference to this case in the statutory text and the United States' motion in the legislative history, when until this point plaintiffs have consistently argued that the Algiers Accords do not prevent this lawsuit. If in fact the Algiers Accords are irrelevant after the Anti-Terrorism Act, as

plaintiffs have contended throughout this litigation, *see* Plf's Mem. in Opp. to Govt's Mot. to Vacate and Dismiss of 11/16/01, then the Court can not infer from Congress' reference to this case a desire to abrogate that irrelevant agreement.

3) Later Legislative History of Subsection 626(c) Accompanying Section 208

Approximately one month after Congress passed subsection 626(c), it passed Section 208. Congress included in Section 208's legislative history an "explanation" of subsection 626(c). Contrary to plaintiffs' arguments, the legislative history attached to Section 208 does not indicate that Congress clearly intended for Subsection 626(c) to abrogate the Algiers Accords.[21]

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[21] Plaintiffs have repeatedly mischaracterized the Court's statements at the motions hearing conducted on December 13, 2001 as requesting from Congress a clarification of the intent behind subsection 626(c). Plaintiffs argue that "the State Department's suggestion that this Court required Congress to enact a new cause of action for plaintiffs in the year 2001 is mistaken. Gov't Br. at 19. This Court solicited guidance from Congress as to its intent in enacting Section 626(c)," Plfs' Rep. Br. of 1/29/02 at 8, and that this Court "sought clarification from Congress." *Id.* As this Court made clear to plaintiffs when they made similar arguments at the status hearing on January 14, 2002, this Court did not specify any particular desired response from Congress, or any response at all. Such a direction to Congress would arguably raise separation of powers concerns. As the government has correctly pointed out, this Court simply expressed concerns with the sufficiency of plaintiffs' arguments and queried as to whether Congress could "take further action" to "pave the way finally for th[e] plaintiffs to have a full recovery." Tr. of 12/13/01 Hearing, at 23, 24, 26, 34, 35, 102. Whatever inferences, if any, that members of Congress wanted to make from the

(Continued on following page)

After explaining the technical amendment accomplished by Section 208, the Joint Explanatory Statement that accompanied the bill presented by the Conference Committee to and ultimately passed by both houses of Congress, stated the following with respect to subsection 626(c):

> The language included in Section 626(c) of Public Law 107-77 quashed the Department of State's motion to vacate the judgment obtained by plaintiffs in Case Number 1:00CV03110 (EGS) and reaffirmed the validity of this claim and its ret-- roactive application. Nevertheless, the Department of State continued to argue that the judgment obtained in Case Number 1:00CV03110 (EGS) should be vacated after Public Law 107-77 was enacted. The provision included in Section 626(c) of Public Law 107-77 acknowledges that, notwithstanding any other authority, the American citizens who were taken hostage by the Islamic Republic of Iran in 1979 have a claim against Iran under the Antiterrorism Act of 1996 and the provision specifically allows the judgment to stand for purposes of award damages consistent with Section 2002 of the Victims of Terrorism Act of 2000 (Public Law 106-386, 114 Stat. 1541).

H.R. Cong. Rep. 107-350 at 422-23.

First, there are several misstatements of law contained in this language. Subsection 626(c) in no way "quashed the Department of State's motion to vacate the

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questions posed by this Court was a matter for those members of Congress to determine.

judgment obtained by plaintiffs in Case Number 1:00CV03110 (EGS)." As discussed above, any Congressional direction to "quash" a motion in a case pending before a federal court would arguably violate Article III of the Constitution. Congress may amend substantive law that impacts ongoing cases, which is arguably what Congress accomplished with subsection 626(c), but for Congress to direct the Court to resolve particular motions in a particular way is highly problematic. The next incorrect statement of law is that subsection 626(c) "acknowledges that, notwithstanding any other authority, the American citizens who were taken hostage by the Islamic Republic of Iran in 1979 have a claim against Iran under the Antiterrorism Act of 1996." As the government correctly points out, see Govt's Supp Br. of 1/29/02, the Antiterrorism Act of 1996 created no cause of action against foreign states, but only created an exception to a jurisdictional bar. The Flatow Amendment created the cause of action, not the Anti-Terrorism Act. Thus, for Congress to say that 626(c) acknowledged a cause of action under the Anti-Terrorism Act is simply incorrect. Finally, the statement that "the provision specifically allows the judgment to stand for purposes of award damages" begs the question that this Court is resolving today. In fact, this Court can not allow a judgment to stand by virtue of subsection 626(c) because Congress has failed to legislate with the requisite specificity of intent. Unless and until it does so, this Court will not recognize the abrogation of the Algiers Accords.

At the end of the day, plaintiffs' argument hinges on the words "notwithstanding any other authority."[22] Setting aside the issue that Congress has incorrectly explained the relationship of the statutes at issue by claiming that the Anti-Terrorism Act of 1996 creates a cause of action, the Court must determine whether "notwithstanding any other authority," expresses a clear intent to abrogate the Algiers Accords and thus enables plaintiffs to proceed to judgment. This Court concludes that the general statement "notwithstanding any other authority" is not a specific renunciation of this country's obligations under a particular binding international agreement. The intent that must be clear from the words used by Congress under Supreme Court precedent is the intent to terminate an international agreement, not the intent to cause whatever result that will occur from that termination. In other words, even if this Court were to decide that this legislative history reflects a Congressional intent for plaintiffs to be able to proceed with their case, and proceeding with the case requires an abrogation of an existing agreement, that does not mean that Congress has therefore expressed an intent to abrogate. An explicit expression of intent to abrogate a binding international agreement requires, at a minimum, an acknowledgment of the existence of that agreement. Nowhere has Congress acknowledged the

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[22] Once again, to be clear, this Court is not answering the questions of whether a legislative history that expresses a clear intent to abrogate an agreement could trump a silent statute, or whether sufficiently clear legislative history passed along with a later statute could trump an earlier silent statute. None of the legislative history in this case clearly indicates an intent to abrogate the Algiers Accords, and therefore this Court need not resolve these questions.

existence of the Algiers Accords, and expressed its collective will to terminate it. Thus, the statement "notwithstanding any other authority" is insufficient. That statement does not include an explicit acknowledgment that the authority that is preventing plaintiffs' claim here is the Algiers Accords.

iv. Section 208 Does Not Abrogate the Algiers Accords

The text of Section 208, which makes only a technical amendment to subsection 626(c), does not express clear intent to abrogate the Algiers Accords. The bulk of legislative history of this section purports only to explain subsection 626(c), not the effect of Section 208. Therefore the legislative history of Section 208, with respect to the impact of that section only, explains only the technical amendment and does not evidence an intent to abrogate the Algiers Accords. H.R. Cong. Rep. 107-350 at 422-23 ("The conference agreement includes Section 208, proposed as Section 105 of Division D of the Senate bill, making a technical correction to Section 626 of Public Law 107 77.")

c. Conclusion

Lest this Court's decision be viewed as denying plaintiffs a remedy for the horrible wrongs they have suffered simply because Congress failed to use the proper choice of words, it is important to reiterate the values that are served by an abrogation doctrine that requires Congress to make its intent clear. The spheres of power of our co-equal branches of government can at times overlap. *See Springer v. Philippine Islands,* 277 U.S. 189, 209, 48 S. Ct.

480, 485 (1928) (dissenting opinion) ("[t]he great ordinances of the Constitution do not establish and divide fields of black and white"). When such overlap occurs, and the wills of two branches are in conflict, the Constitution sets forth the rules for deciding which branch gets to trump the will of the other. In this case, by virtue of his power to direct the foreign affairs of this country, the President clearly has the authority to enter into international agreements. Congress, however, clearly has the corresponding right to abrogate the agreement reached by the President if it so wishes. Because of the respect owed to each co-equal branch of government, the courts must require that Congress make its intent clear, either by legislating unambiguously or accompanying ambiguous statutes with clear expressions of intent. Any other rule would allow the courts, by inference and interpretation, to impermissibly assume the legislative role.

Furthermore, while the power of Congress to legislate substantive law through riders attached to appropriations bills and thereby bypass the usual process of development of law is established, this case exemplifies the difficulty faced by a court when interpreting the intent of Congress in passing such riders. *See, e.g., Robertson,* 503 U.S. at 440 ("Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly."); *United States v. Will,* 449 U.S. 200, 222, 101 S. Ct. 471 (1980). Three of the four statutes at issue in this case, the Flatow Amendment, Subsection 626(c), and Section 208, were passed as appropriations riders with minimal legislative history to explain their purpose and relation to each other. When faced with such sparse explanation of statutory text, the Court must be even more vigilant in its

refusal to draw inferences, even desirable inferences, that would fill in the gaps in congressional logic.

In the end, plaintiffs cite the text and legislative history of each of these statutes less as statements of the law than as signs that "Congress has sided with plaintiffs" and "does not want the State Department to prevail." Plfs' Surreply of 12/4/01 at 2,5,10,12. It is unclear how plaintiffs are able to discern the clear intent of Congress when subsection 626(c) was not drafted until after H.R. 2500 had gone to conference, was never discussed in committee, was never subjected to floor debate, and the Conference Report offers only the most opaque reference to this case without ever explaining what precisely what [sic] the statute purports to do, or why. Similarly, the explanation of subsection 626(c) found in the legislative history of Section 208's technical amendment, was also created in conference, and no where does it express a recognition of the obligations of this country under the Algiers Accords, or that Congress meant to eliminate those obligations. In the final analysis, the questions presented to this Court must be resolved by examining the text and legislative history of the relevant statutes, "not by psychoanalyzing those who enacted [them]." *Carter v. United States,* 530 U.S. 255, 271, 120 S. Ct. 2159 (2000). None of the statutes invoked by plaintiffs contain the language that Supreme Court precedent of very long-standing requires in order for plaintiffs to prevail. Such straightforward legislation would be simple enough to draft, as Senator Harkin's proposed bill has demonstrated, but by the same token, by virtue of its clarity of purpose, may be difficult to enact. In light of Congress' failure to express a clear intent to abrogate the Algiers Accords, this Court can not interpret these ambiguous statutes to create a cause of action for

plaintiffs against Iran. Absent such plain, straightforward statutory language that expressly creates a cause of action for plaintiffs or reflects a clear intent to abrogate the Algiers Accords, this Court has no choice but to abide by and uphold the commitments that the United States made to the Islamic Republic of Iran in order to secure the freedom of the plaintiff hostages in 1981.

IV. Plaintiff's Counsel's Ethical Obligations

Having resolved the controversy presented by this remarkable case, this Court would be remiss not to address what the Court believes are the problematic actions of plaintiffs' counsel throughout this case. While this Court is not inclined to impose sanctions, the applicability of Rule 11 of the Federal Rules of Civil Procedure warrants some discussion. It is not in spite of, but out of respect and concern for the class of plaintiffs in this case that this Court feels it necessary to comment on the repeated ethical failures by class counsel.

Unlike other professions, in the practice of law basic competence and ethical obligations are enforceable and intertwined. Every time an attorney files a document in federal court, she must certify to the Court that the legal arguments contained therein, "to the best of the person's knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances* . . . are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11 (emphasis added). In addition, attorneys practicing in this Court have a corresponding ethical obligation, according to the Rules of Professional Responsibility, to disclose to the

Court any and all adverse controlling authority. *See* LCvR 83.12(b) and LCvR 83.15 (incorporating Rule of Professional Conduct 3.3(a)(3)).[23] What these requirements mean in practice is that ignorance is no excuse for an attorney. An attorney can not carry out the practice of law like an ostrich with her head in the sand, ignoring her duty to research and acknowledge adverse precedent and law. Attorneys are not free to assert any and all legal arguments they wish on behalf of their clients, without regard to existing precedent.

Indeed, this requirement serves not only to protect the Court but also to protect the attorney's clients. The plaintiffs in this case, like every other case conducted by an attorney admitted as a member of the Bar of this Court; deserve council who will fulfill their ethical obligations and argue passionately and persuasively for their client as possible without making frivolous arguments that lack a basis in law. Such arguments are a waste of the Court's time and the client's time as well.

Plaintiffs' counsel in this case repeatedly presented meritless arguments to this Court, repeatedly failed to substantiate their arguments by reference to any supporting authority, and repeatedly failed to bring to the Court's attention the existence of controlling authority that conflicted with those arguments. The Court will not belabor this point beyond the specific discussion of plaintiffs' arguments in this Opinion. However, by way of

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[23] Rule 3.3(a)(3) states "A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly adverse to the position of the client."

example, this Court finds particularly problematic the following:

> Plaintiffs' total failure to bring to this Court's attention the Algiers Accords and implementing regulations despite the FSIA's requirement that plaintiffs "establish[ed] [their] claim or right to relief by evidence that is satisfactory to the Court." 28 U.S.C. §1608(e).
>
> Plaintiffs' failure to address any of the two hundred years of cases regarding conflicts between legislation and previously-enacted treaties and international agreements until ordered to do so by the Court.
>
> Plaintiffs request for a default judgment on liability prior to this Court hearing any evidence to support their claims, despite the clear statutory requirement in 28 U.S.C. §1608(e).
>
> Plaintiff's motion to strike the government's motion to intervene that raised a completely frivolous argument and did not contain any discussion of the requirements of Federal Rule of Civil Procedure 24.
>
> Plaintiff's argument that the Algiers Accords are the legally invalid result of coercion, raised very late in these proceedings, and clearly contradicted by Supreme Court precedent.

While such arguments in any case would raise concern, the Court is particularly concerned given the highly emotional nature of this case and the emotional toll it may have imposed on plaintiffs. Plaintiffs' counsel may argue that the United States government has unnecessarily dashed the hopes of recovery for these plaintiffs, but given

the existing law on the abrogation of international agreements, the Court must ask how high those hopes were raised in the first place and on whose shoulders that responsibility should fall.

CONCLUSION

For the foregoing reasons, it is hereby ordered that the United States' motion to intervene is **GRANTED** and plaintiffs' motion to strike the United States' motion to intervene is **DENIED**. The default judgment on liability entered on August 17, 2001, is hereby **VACATED**. The United States' motion to dismiss is **GRANTED** because plaintiffs have failed to state a claim upon which this Court can grant relief. This case is therefore **DISMISSED**. An appropriate Order accompanies this memorandum opinion.

4/18/02 /s/ Emmet G. Sullivan

DATE **EMMET G. SULLIVAN**
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. ROEDER, *et al.*, Plaintiffs, v. THE ISLAMIC REPUBLIC OF IRAN and THE MINISTRY OF FOREIGN AFFAIRS, Defendants.	Civ. Action No. 00-3110 (EGS) [30-1] [30-2] [37-1]

ORDER and DISMISSAL

(Filed Apr. 18, 2002)

For the reasons stated in the Memorandum Opinion issued today, April 18, 2002, it is hereby

ORDERED that the United States' motion to intervene is **GRANTED**; it is

FURTHER ORDERED that plaintiffs' motion to strike the United States' motion to intervene is **DENIED**; it is

FURTHER ORDERED that the default judgment on liability entered on August 17, 2001, is **VACATED**; it is

FURTHER ORDERED that the United States' motion to dismiss is **GRANTED** because plaintiffs have failed to state a claim upon which this Court can grant relief; it is

FURTHER ORDERED that this case is **DISMISSED**.

IT IS SO ORDERED.

4/18/02 /s/ Emmet G. Sullivan

DATE **EMMET G. SULLIVAN**
UNITED STATES
DISTRICT JUDGE

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APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5145 **September Term, 2003**
00cv03110

Filed On: November 7, 2003
[783542]

David M. Roeder, et al.,
Appellants

v.

Islamic Republic of Iran, et al.,
Appellees

BEFORE: Henderson, Randolph and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed September 15, 2003, the supplements thereto and the response, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5145 **September Term, 2003**
00cv03110

Filed On: November 7, 2003
[783541]

David M. Roeder, et al.,
Appellants

v.

Islamic Republic of Iran, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, the supplements thereto and the response, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 113 Stat. 1501 (codified at 28 U.S.C. § 1605(a)(7)):

• 28 U.S.C. § 1605(a)(7). General exceptions to the jurisdictional immunity of a foreign state.

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> . . . (7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that with the court shall decline to hear a claim under this paragraph –
>
> > (A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110 (*EGS*) in the United States District Court for the District of Columbia; and
> >
> > (B) even if the foreign state is or was so designated, if –

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred. . . .

(e) for purposes of paragraph (7) of subsection (a) –

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; . . .

Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, § 589, 110 Stat. 3009-172 (codified at § 1605 note)

• Civil Liability for Acts of State Sponsored Terrorism, Pub.L. No. 104-208, Div. A, Title I, § 101(c) [Title V, § 589], Sept. 30, 1996, 110 Stat. 3009-172, provides:

(a) An official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 [section 2405(j) of the Appendix to Title 50, War and National Defense] while acting within the scope of his or her office, employment, or agency shall be liable

to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code [subsec. (a)(7) of this section] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7) [subsec. (a)(7) of this section].

(b) Provisions related to statute of limitations and limitations on discovery that would apply to an action brought under 28 U.S.C. 1605(f) and (g) [subsecs. (f) and (g) of this section] shall also apply to actions brought under this section. No action shall be maintained under this action [sic] if any official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States.

Department of Defense and Emergency Supplemental Appropriations For Recovery From and Response to Terrorist Attacks on the United States Act, Pub. L. No. 107-117, 115 Stat. 2230 (2002)

SEC. 208. Section 626(c) of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 2002 (Public Law 107-77) is amended by striking "1:00CV03110(ESG)" and inserting "1:00CV03110(EGS)".

Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 2002 Public Law No. 107-77 (2001)

Sec. 626. <<NOTE: President. Deadline.>> (a) The President shall submit, by not later than the time of submission of the Budget of the United States Government for Fiscal Year 2003, a legislative proposal to establish a comprehensive program to ensure fair, equitable, and prompt compensation for all United States victims of international terrorism (or relatives of deceased United States victims of international terrorism) that occurred or occurs on or after November 1, 1979. (c) Amend 28 U.S.C. Section 1605(a)(7)(A) by inserting at the end, before the semicolon, the following: "or the act is related to Case Number 1:00CV03110(ESG) in the United States District Court for the District of Columbia".

Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464

- Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 provides:

  (a) PAYMENTS.

  (1) IN GENERAL.__Subject to subsections (b) and (c), the Secretary of the Treasury shall pay each person described in paragraph (2), at the person's election__

  (2) PERSONS COVERED.__A person described in this paragraph is a person who__

  (A)(i) as of July 20, 2000, held a final judgment for a claim or claims brought under

section 1605(a)(7) of title 28, United States Code, against Iran or Cuba. . . .

. . .(2) JUDGMENTS AGAINST IRAN.__For purposes of funding payments under subsection (a) in the case of judgments against Iran, the Secretary of the Treasury shall make such payments from amounts paid and liquidated from –

(A) rental proceeds accrued on the date of the enactment of this Act from Iranian diplomatic and consular property located in the United States; and

(B) funds not otherwise made available in an amount not to exceed the total of the amount in the Iran Foreign Military Sales Program account within the Foreign Military Sales Fund on the date of the enactment of this Act.

(c) SUBROGATION.__Upon payment under subsection (a) with respect to payments in connection with a Foreign Military Sales Program account, the United States shall be fully subrogated, to the extent of the payments, to all rights of the person paid under that subsection against the debtor foreign state. The President shall pursue these subrogated rights as claims or offsets of the United States in appropriate ways, including any negotiation process which precedes the normalization of relations between the foreign state designated as a state sponsor of terrorism and the United States, except that no funds shall be paid to Iran, or released to Iran, from property blocked under the International Emergency Economic Powers Act or from the

> Foreign Military Sales Fund, until such subrogated claims have been dealt with to the satisfaction of the United States . . .

Treasury Department Appropriations Act of 1998, Pub. L. No. 105-277, Title I, § 117(d) (codified in 28 U.S.C. § 1610 note)

Sec. 117. Exception to Immunity From Attachment or Execution. (a) Section 1610 of title 28, United States Code, is amended by adding at the end the following new subsection: "(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7). "(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons. "(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the

Secretary of State shall fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state. "(B) In providing such assistance, the Secretaries – "(i) may provide such information to the court under seal; and "(ii) shall provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.". (b) Conforming Amendment. – Section 1606 of title 28, United States Code, is amended by inserting after "punitive damages" the following: ", except any action under section 1605(a)(7) or 1610(f)". (c) Effective Date <<NOTE: 28 USC 1610 note.>>. – The amendments made by subsections (a) and (b) shall apply to any claim for which a foreign state is not immune under section 1605(a)(7) of title 28, United States Code, arising before, on, or after the date of enactment of this Act. (d) Waiver. – <<NOTE: 28 USC 1610 note.>> The President may waive the requirements of this section in the interest of national security.

H.R. Conf. Report 107-350, at 422-23(2001)

The language included in Section 626(c) of Public Law No. 107-77 quashed the Department of State's motion to vacate the judgment obtained by plaintiffs in Case Number 1:00CV-3110 (EGS) and reaffirmed the validity of this claim and its retroactive application. Nevertheless, the Department of State continued to argue that the judgment obtained in Case Number 1:00CV-3110 (EGS) should be vacated after Public Law No. 107-77 was enacted. The provision included in Section 626(c) of Public Law No. 107-77

acknowledges that, notwithstanding any other authority, the American citizens who were taken hostage by the Islamic Republic of Iran in 1979 have a claim against Iran under the Antiterrorism Act of 1996 and the provision specifically allows the judgment to stand for purposes of award damages consistent with Section 2002 of the Victims of Terrorism Act of 2000 (Public Law No. 106-386, 114 Stat. 1541).

APPENDIX E

THE NEW YORK TIMES
Tuesday, December 23, 1980

Iranian Asserts Captives Face Trials if Demand for Funds Is Not Met

TEHERAN, Iran, Dec. 22 – The Speaker of Iran's Parliament said today that the 52 American hostages would be put on trial if the United States did not agree to the Iranian demand for a deposit of some $24 billion in Algeria for their release. "It is a just and fair answer we have given," the Speaker, Hojatolislam Hashemi Rafsanjani, said of the Iranian demand as he renewed an often-expressed Iranian threat that the hostages would be tried as spies if the United States balked at Iran's terms.

* * *

APPENDIX F

OUR TELEX WITH TEST NO 210998 WAS TRANSMITTED TO YOU CONTAINS OUR OFFICIAL INSTRUCTION FOR WHICH WE HAVE AUTHORIZATION FROM THE GOVERNMENT OF ISLAMIC REPUBLIC OF IRAN AND NONEXECUTION OF OUR INSTRUCTION WOULD ENTAIL SERIOUS CONSEQUENCES FOR THE RELEASE OF 52 AMERICAN NATIONALS BEING DETAINED IN IRAN AND THE RESPONSIBILITY FOR THIS RESTS ENTIRELY WITH YOU.

(2)

Supreme Court, U.S.
FILED
MAY 12 2004
OFFICE OF THE CLERK

No. 03-1147

In the Supreme Court of the United States

DAVID M. ROEDER, ET AL., PETITIONERS

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Petitioners include former hostages who were held in Iran for 444 days between 1979 and 1981, as well as family members of such hostages. The President negotiated their release under an international agreement known as the Algiers Accords. In exchange for the release of the hostages, the Algiers Accords included a commitment by the United States to bar and preclude the prosecution of any claim against Iran arising out of the hostages' seizure and detention. The question presented is as follows:

Whether the preclusion of private suits effected by the Algiers Accords was superseded by Acts of Congress providing that the Republic of Iran does not have sovereign immunity from the claims raised in the instant case.

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In the Supreme Court of the United States

No. 03-1147

DAVID M. ROEDER, ET AL., PETITIONERS

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 333 F.3d 228. The opinion of the district court (Pet. App. 20a-108a) is reported at 195 F. Supp. 2d 140.

JURISDICTION

The court of appeals entered its judgment on July 1, 2003. A petition for rehearing was denied on November 7, 2003 (Pet. App. 111a-112a). The petition for a writ of certiorari was filed on February 5, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 4, 1979, Iranian militants unlawfully seized the United States Embassy in Tehran, Iran,

and captured the Embassy's personnel. The captured individuals were held hostage for a period of 444 days. They were ultimately released on January 20, 1981, pursuant to an international executive agreement known as the Algiers Accords, which had been executed the preceding day. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 662-665 (1981); Pet. App. 25a-27a.

The Algiers Accords include two declarations of the government of Algeria, embodying an international agreement between the United States and Iran. See Settlement of the Hostage Crisis, Jan. 18, 1981, U.S.-Iran, 20 I.L.M. 223; *Dames & Moore*, 453 U.S. at 664; Pet. App. 27a. A central purpose of the Algiers Accords was the negotiated release of the Americans held hostage in Tehran, and the international agreement was accordingly made contingent on the hostages' freedom. See 20 I.L.M. at 225 (requiring certification "that the 52 U.S. nationals have safely departed from Iran" before funds would be transferred from escrow). In agreeing to the Algiers Accords, the United States committed to "bar and preclude the prosecution against Iran of any pending or future claim of * * * a United States national arising out of events * * * related to (A) the seizure of the 52 United States nationals on November 4, 1979, [or] (B) their subsequent detention." *Id.* at 227 (quoted at Pet. App. 28a).[1] The Algiers Accords were subsequently implemented by a series of Executive Orders and Treasury Department regulations. See Pet. App. 29a-31a; *Dames & Moore*, 453 U.S. at 665-666.

---

[1] Claims arising out of the seizure and detention of the hostages are also expressly excluded from the arbitral jurisdiction of the Iran-United States Claims Tribunal. See 20 I.L.M. at 231; Pet. App. 29a.

2. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, provides "the sole basis for obtaining jurisdiction over a foreign state in our courts" in a civil suit. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Under the FSIA, foreign governments and their agencies or instrumentalities are immune from suit in United States courts unless a specific statutory exception applies. 28 U.S.C. 1604; *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993). In 1996, Congress amended the FSIA to add a new exception to the general rule of foreign sovereign immunity. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 221(a)(1), 110 Stat. 1241 (28 U.S.C. 1605(a)(7) (Supp. I 2001)). Under that amendment, foreign sovereign immunity is unavailable in certain suits "in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources * * * for such an act." 28 U.S.C. 1605(a)(7) (Supp. I 2001). That exception to the general rule of foreign sovereign immunity applies if the foreign state was designated as a state sponsor of terrorism by the Department of State at the time the act occurred, or if the foreign state was subsequently so designated as a result of the act that is the basis for the suit. 28 U.S.C. 1605(a)(7)(A) (Supp. I 2001).

Later in 1996, Congress enacted a provision commonly known as the Flatow Amendment, which addresses the potential liability of foreign officers and agents for acts of terrorism perpetrated in the course of their official duties. See Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Div. A., Tit. I, § 101(c) [Tit. V, § 589(a)], 110 Stat. 3009-172 (28 U.S.C.

1605 note). Under the Flatow Amendment, individual officers and agents of designated state sponsors of terrorism may be held personally liable for their perpetration of the acts described in 28 U.S.C. 1605(a)(7) (Supp. I 2001). See *Cicippio-Puleo* v. *Islamic Republic of Iran*, 353 F.3d 1024, 1029 (D.C. Cir. 2004). By its terms, however, the Flatow Amendment applies only to "[a]n official, employee, or agent of a foreign state designated as a state sponsor of terrorism," not to the foreign state itself. See *id.* at 1032. The D.C. Circuit recently held in *Cicippio-Puleo* that "neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government." *Id.* at 1033.

3. Petitioners include the Americans held hostage in Iran in 1979-1981, as well as their family members. They brought this suit in 2000, naming as defendants the Islamic Republic of Iran and the Iranian Ministry of Foreign Affairs. The suit seeks compensation for injuries resulting from the detention and seizure of the hostages. Iran did not appear in the district court to defend against petitioners' action, and in August 2001, the court entered a default judgment on liability. See Pet. App. 20-21a, 34a-35a.

In October 2001, shortly before a scheduled trial to determine the appropriate amount of damages, the United States filed a motion to intervene in this case, as well as a separate motion to vacate the default judgment and dismiss petitioners' complaint. Pet. App. 35a-36a. The government urged two independent grounds for dismissal. First, the United States argued that the government of Iran retained its sovereign immunity from this suit under the FSIA. The government contended that 28 U.S.C. 1605(a)(7), which provides that foreign states are not immune from suit for certain acts

of state-sponsored terrorism, was inapplicable to this case because Iran had not been designated as a state sponsor of terrorism either at the time the hostages were seized and detained, or as a result of the hostage-taking. Pet. App. 36a; see *id.* at 11a-12a. Second, the government argued that the Algiers Accords had extinguished petitioners' claims. *Id.* at 36a.

In December 2001, while the government's motions to intervene and to vacate the default judgment were pending in the district court, Congress amended 28 U.S.C. 1605(a)(7)(A)—the FSIA exception to the rule of foreign sovereign immunity that applies in certain cases involving state-sponsored terrorism—to add a specific reference to the present case. Act of Nov. 28, 2001, Pub. L. No. 107-77, § 626(c), 115 Stat. 803. Approximately one month later, Congress amended that provision to correct the erroneous designation of the district judge's initials in the provision as originally enacted. Act of Jan. 10, 2002, Pub. L. No. 107-117, § 208, 115 Stat. 2299 (reprinted at Pet. App. 115a); see Pet. App. 113a (text of 28 U.S.C. 1605(a)(7)(A) (Supp. I 2001) in its current form).

4. The district court granted the government's motion to intervene, vacated its earlier default judgment, and dismissed petitioners' complaint. Pet. App. 20a-108a. The court acknowledged that the recent appropriations provisions, cited above, had "amend[ed] the FSIA to allow for a waiver of sovereign immunity not only when the state-sponsor designation results from the act at issue, but also for any acts related to this litigation." *Id.* at 61a. The court held, however, that petitioners "do not have a cause of action against Iran because the Algiers Accords require that this suit be dismissed." *Id.* at 69a.

Petitioners contended that the Algiers Accords are invalid because they "resulted from Iran's 'demanding of money from another government to stop inflicting pain and suffering upon its innocent citizens' and are therefore an unenforceable illegal contract." Pet. App. 72a. The district court rejected that argument, explaining that petitioners' challenge was foreclosed by this Court's decision in *Dames & Moore*, 453 U.S. at 686, which "upholds the Algiers Accords as an exercise of the President's power." Pet. App. 72a-73a. The court recognized that "Congress has the power to disagree with and overturn" executive agreements that extinguish private claims. *Id.* at 73a. The court concluded, however, that none of the statutes on which petitioners relied manifested a clear legislative intent to abrogate the Algiers Accords. See *id.* at 73a-105a.

5. The court of appeals affirmed. Pet. App. 1a-19a.

a. The court of appeals held that the district court had acted properly in granting the government's motion to intervene as of right. Pet. App. 6a-9a. The court explained that the United States had moved to intervene "less than thirty days after the State Department received notice of the potential conflict with the executive agreement," and that "the interest of the United States in meeting its obligations under the executive agreement with Iran entitled it to intervene as a defendant." *Id.* at 8a (internal quotation marks omitted). The court also held that, for purposes of the Flatow Amendment (see pp. 3-4, *supra*), Iran's Ministry of Foreign Affairs "must be treated as the state of Iran itself rather than as its agent." Pet. App. 11a; see *id.* at 10a-11a.

b. The court of appeals held that the recent appropriations laws on which petitioners principally relied had not abrogated the Algiers Accords. Pet. App. 11a-

19a. While noting that "[t]he authority of the President to settle claims of American nationals through executive agreements is clear," the court acknowledged that "[t]here is no doubt that laws passed after the President enters into an executive agreement may abrogate the agreement." *Id.* at 11a. The court concluded, however, that petitioners had failed to identify any statutory language reflecting a clear congressional intent to accomplish that result.

The court of appeals explained that the recent appropriations laws

> created an exception, for this case alone, to Iran's sovereign immunity, which would otherwise have barred the action. The evident purpose was to dispose of the government's argument, in its motion to vacate [the default judgment], that [petitioners'] action should be dismissed because Iran had not been designated a state sponsor of terrorism at the time the hostages were captured and held, and that Iran's later designation (in 1984) rested not on the hostage crisis but on its support of terrorism outside its borders.

Pet. App. 12a-13a. The court observed, however, that "[t]he question remained whether the Algiers Accords, on which the United States had relied as a second ground for dismissal, survived the [appropriations laws]." *Id.* at 13a (citation omitted). The court noted that those laws "do not, on their face, say anything about the Accords," but "speak only to the antecedent question of Iran's immunity from suit in United States courts." *Ibid.* The court acknowledged that the joint explanatory statement accompanying the second appropriations law contained language supporting petitioners' position, see *id.* at 16a, but it observed that

"Congress did not vote on the statement and the President did not sign a bill embodying it," *id.* at 16a-17a. The court explained that "neither a treaty nor an executive agreement will be considered abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed," *id.* at 17a (internal quotation marks omitted), and it found "no clear expression in anything Congress enacted abrogating the Algiers Accords," *ibid.*

Finally, the court of appeals rejected petitioners' contention that the pertinent appropriations provisions would be rendered "futile" if they were construed not to abrogate the Algiers Accords. Pet. App. 18a-19a. The court explained that, assuming those provisions were constitutional, they

> had the effect of removing Iran's sovereign immunity, which the United States had raised in its motion to vacate. This enabled [petitioners] to argue that the Accords were not a valid executive agreement. [Petitioners] in fact made this argument in the district court (but they do not make it here). That the district court rejected the argument is of no moment. [Petitioners'] opportunity to have it decided resulted directly from the amendments.

Id. at 19a (footnote and citations omitted).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. As the court of appeals explained, "[t]he authority of the President to settle claims of American nationals through executive agreements is clear." Pet. App. 11a;

see *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374, 2387 (2003) ("Given the fact that the practice goes back over 200 years to the first Presidential administration, and has received congressional acquiescence throughout its history, the conclusion that the President's control of foreign relations includes the settlement of claims is indisputable.") (brackets and internal quotation marks omitted); *Dames & Moore*, 453 U.S. at 679 & n.8. In *Dames & Moore*, this Court upheld the settlement of claims accomplished in the Algiers Accords as a permissible exercise of that Presidential authority. See *id.* at 686, 688. And while petitioners contested the validity of the Algiers Accords in the district court, the district court rejected that challenge, see Pet. App. 72a-73a, and petitioners did not pursue it on appeal, see *id.* at 19a. Thus, any uncertainty that may exist concerning the scope of the President's authority to enter into executive agreements in other contexts (see Pet. 21 n.3) is irrelevant to the disposition of the instant case.

2. Twenty years ago, in *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984), the court of appeals dismissed an earlier suit brought by one of the American hostages and his parents seeking damages for his seizure and detention. The court held that no FSIA exception to the general rule of foreign sovereign immunity applied to the case, and that the Republic of Iran was therefore immune from suit. *Id.* at 838-839. In light of its determination that it lacked jurisdiction under the FSIA, the court in *Persinger* declined to reach the question whether the plaintiffs' claims were properly extinguished pursuant to the Algiers Accords. *Id.* at 838.

The court of appeals in *Persinger* thus recognized that Iran's sovereign immunity under the FSIA, and the extinguishment pursuant to the Algiers Accords of

private claims arising out of the seizure and detention of the American hostages, imposed two analytically distinct barriers to claims of the sort raised in this case. In its initial district court filings in this case, the United States likewise relied on the FSIA and the Algiers Accords as independent grounds for dismissal of petitioners' suit. Although the appropriations laws on which petitioners rely refer to the instant case by docket number, and thus reflect congressional awareness of the litigation, they speak only to the question whether Iran is immune from suit under the FSIA. Those laws neither address the continuing validity of the Algiers Accords nor purport to confer a cause of action. See Pet. App. 16a (court of appeals explains that "[t]he text of [the first appropriations provision] is consistent with removing the government's first argument for dismissal" but "says nothing about the second"). Particularly in light of the legal backdrop against which Congress acted, there is no basis for construing the recent appropriations laws as abrogating the commitment made by the President in the Algiers Accords.

3. Petitioners' arguments on the merits do not withstand scrutiny.

a. Petitioners suggest (Pet. 27-28) that the relevant appropriations provisions would serve no meaningful purpose if they are construed not to affect the validity of the Algiers Accords. As the court of appeals recognized (Pet. App. 19a), however, those provisions removed Iran's sovereign immunity for the acts in question, and thus allowed petitioners to obtain a judicial ruling on their claim that the Algiers Accords were invalid *ab initio*—a contention that the court in *Persinger* had previously declined to address. Elimination of the barrier to suit that was formerly imposed

by the FSIA also served the related purpose of clarifying the locus of responsibility for dismissal of petitioners' claims. Before those appropriations laws were enacted, petitioners' suit was subject to dismissal on one ground (the FSIA) that was attributable to Congress itself, and on another ground (the Algiers Accords) that reflected a legitimate exercise of purely executive power. Even though Congress was unwilling to abrogate the executive agreement through which the release of the hostages had initially been obtained, Congress may have wished to make clear that the Legislative Branch had not imposed any affirmative obstacle to petitioners' efforts to obtain relief.

b. Petitioners rely on the joint explanatory statement accompanying the second of the two pertinent appropriations laws, which contains language that in petitioners' view (Pet. 26) suggests that Congress intended in the first of the appropriations laws to remove *all* existing barriers to petitioners' suit. See H.R. Conf. Rep. No. 350, 107th Cong., 1st Sess. 422-423 (2001) (stating that the previously enacted appropriations provision "acknowledges that, notwithstanding any other authority, the American citizens who were taken hostage by the Islamic Republic of Iran in 1979 have a claim against Iran under [AEDPA] and the provision specifically allows the judgment to stand"). The court of appeals stated that the language contained in the joint explanatory statement (and particularly the phrase "notwithstanding any other authority") might have been sufficient to abrogate the Algiers Accords if that language had been enacted into law. Pet. App. 16a. The court recognized, however, that, while legislative history may assist in the interpretation of ambiguous statutory language, the joint explanatory statement does not itself have the force of law. See *id.* at 16a-17a

("Congress did not vote on the statement and the President did not sign a bill embodying it."). Because the relevant appropriations provisions only amended the FSIA to expand the pre-existing state-sponsored terrorism exception to the rule of foreign sovereign immunity, but did not abrogate the Algiers Accords or amend any law other than the FSIA, those provisions cannot properly be construed to eliminate the barrier to petitioners' suit imposed by the executive agreement.

Petitioners' reliance (Pet. 26) on the joint explanatory statement is particularly misplaced because that statement was published *after* the enactment of the appropriations law that is alleged to have abrogated the Algiers Accords. The joint explanatory statement in question accompanied the *second* of the two appropriations provisions, which simply corrected an error in the initials of the district judge in the caption of this case. See p. 5, *supra*. Obviously that technical correction could not have had the effect of abrogating the Algiers Accords. Although the joint explanatory statement purports to describe the legal effect of the *first* appropriations provision, such "subsequent legislative history" has minimal interpretive value. See, *e.g.*, *Consumer Prod. Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 118 n.13 (1980); Pet. App. 17a.

4. Petitioners contend (Pet. 15-18) that the court of appeals' holding conflicts with decisions of this Court and of other courts of appeals. Petitioners do not allege a conflict with respect to the specific question of statutory interpretation presented by this case—*i.e.*, whether the Algiers Accords were abrogated by the recent appropriations provisions that amended 28 U.S.C. 1605(a)(7)(A). Rather, petitioners argue that the interpretive standard applied by the court of appeals, under which an Act of Congress will not be treated as

abrogating an executive agreement unless the statute contains a clear expression of that intent (see Pet. App. 17a-18a), conflicts with prior rulings. That claim lacks merit.

a. Petitioners' reliance (Pet. 16) on *Whitney* v. *Robertson*, 124 U.S. 190 (1888), is misplaced. The Court in *Whitney* held only that "*when a law is clear in its provisions*, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty." *Id* at 195 (emphasis added). The Court did not suggest that an *ambiguous* federal statute can properly be interpreted to abrogate an existing treaty. To the contrary, the Court stated that, when a treaty and a statute "relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either." *Id.* at 194. This Court has consistently recognized that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (quoting *Cook* v. *United States*, 288 U.S. 102, 120 (1933)); see also, *e.g.*, *ibid.* (referring to the "firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action").

Petitioners identify no decision suggesting that the rule of construction described above is inapplicable when an Act of Congress is claimed to have abrogated an executive agreement. Nor would such a distinction be appropriate. Although the term "treaty" has different meanings in different contexts, see *Weinberger* v. *Rossi*, 456 U.S. 25, 29-31 (1982), "[u]nder principles of international law, the word ordinarily refers to an international agreement concluded between sovereigns,

regardless of the manner in which the agreement is brought into force," *id.* at 29. And, as the court of appeals recognized, "[e]xecutive agreements are essentially contracts between nations, and like contracts between individuals, executive agreements are expected to be honored by the parties." Pet. App. 18a. The determination whether a federal statute has abrogated an executive agreement thus directly implicates the long-established interpretive principle that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)); see *Rossi*, 456 U.S. at 32.[2]

b. The court of appeals decisions on which petitioners rely (Pet. 16-17) are likewise inapposite.[3] The court in *Havana Club Holding, S.A.* v. *Galleon S.A.*, 203 F.3d 116 (2d Cir.), cert. denied, 531 U.S. 918 (2000), held only that an Act of Congress may have the effect of abrogating a prior international agreement even if the agreement is not specifically identified in the text of the superseding statute. *Id.* at 124. Rather, the court

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[2] Requiring a clear statement of legislative intent to abrogate an executive agreement ensures, *inter alia*, that the President can make a fully informed decision whether to sign or veto a bill passed by Congress. See U.S. Const. Art. I, § 7, Cl. 2. In making that decision, the President could consider the foreign policy consequences, including the possible reactions of other governments, that abrogation of an existing agreement might entail. In the instant case, the President signed both of the appropriations laws on which petitioners rely, while expressing his intent that the laws be implemented "in a manner consistent with the obligations of the United States under the Algiers Accords." Pet. App. 17a n.6 (quoting Presidential signing statement).

[3] Although petitioners refer to those decisions as "faithfully following *Whitney*" (Pet. 16), neither of the court of appeals decisions described at pages 16-17 of the petition cites *Whitney*.

explained, "[w]hat is required is a clear expression by Congress of a purpose to override protection that a treaty would otherwise provide." *Ibid.* The D.C. Circuit's decision in the instant case is consistent with that analysis. The appropriations laws on which petitioners rely contain no "clear expression" of a congressional purpose to validate petitioners' claims on the merits or to provide petitioners a cause of action against Iran, and thus to override the effect of the Algiers Accords. Nor did the D.C. Circuit hold that a specific statutory reference to the Algiers Accords was a prerequisite to abrogation of that agreement.[4]

In *United States* v. *Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955), the court of appeals held that an executive agreement was void where it "contravened provisions of a statute dealing with the very matter to which it related." In the instant case, by contrast, petitioners do not contend that any federal statute enacted prior to 1981 conferred a cause of action for their claims against Iran. Nor did the D.C. Circuit in this case question the

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[4] In discussing the legislative history accompanying the second of the appropriations laws on which petitioners rely, the court of appeals quoted the assertion in the joint explanatory statement that "*notwithstanding any other authority*, the American citizens who were taken hostage by the Islamic Republic of Iran in 1979 have a claim against Iran." Pet. App. 16a (quoting H.R. Conf. Rep. No. 350, 107th Cong., 1st Sess. 422–423 (2001)) (emphasis added by court of appeals). The court observed that "[t]his statement, and the italicized language in particular, is the type of language that might abrogate an executive agreement—if the statement had been enacted." *Ibid.* In light of the court of appeals' characterization of that language as potentially sufficient to abrogate the Algiers Accords, the court's opinion cannot reasonably be read to require specific identification in the statutory text of the executive agreement sought to be superseded.

proposition that, if the Algiers Accords were shown to conflict with subsequently enacted federal legislation, the provisions of the Act of Congress would supersede those of the executive agreement. Because the court in *Guy W. Capps* did not discuss the interpretive standard to be used in determining whether an executive agreement and an Act of Congress are in conflict, that decision is irrelevant to the question presented here.[5]

5. Petitioners contend (Pet. 18-25) that the court of appeals' decision contravenes separation-of-powers principles by allowing an executive agreement that was not ratified by the Senate to supersede an Act of Congress. That argument is baseless. The court of appeals did not, as petitioners suggest (Pet. 20), treat "legislation abrogating an executive agreement" as "constitutionally suspect"; nor did it "elevat[e] * * * unilateral executive action over statutes enacted by

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[5] Petitioners also suggest (Pet. 29) that the D.C. Circuit's decision in this case is inconsistent with the same court's subsequent ruling in *Cicippio-Puleo* v. *Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004). If any tension between those decisions existed, its resolution would be primarily entrusted to the D.C. Circuit. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam). In any event, the two decisions are wholly consistent. The court in *Cicippio-Puleo* recognized that, under the Flatow Amendment (see pp. 3-4, *supra*), individual officers and agents of designated state sponsors of terrorism may be held personally liable for their perpetration of the acts described in 28 U.S.C. 1605(a)(7) (Supp. I 2001). See 353 F.3d at 1029. The court also observed that, subject to certain conditions, "Section 1605(a)(7) waives the sovereign immunity of a designated 'foreign state' in actions in which money damages are sought for personal injury or death caused by one of the specified acts of terrorism." *Id.* at 1032. The court squarely held, however, that "neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government." *Id.* at 1033; see p. 4, *supra*.

Congress and signed by the President" (*ibid.*). To the contrary, the court recognized that "[t]here is no doubt that laws passed after the President enters into an executive agreement may abrogate the agreement." Pet. App. 11a. The court's determination that the particular laws on which petitioners rely did not have that effect raises no meaningful constitutional concern.

Petitioners are also wrong in contending (Pet. 26-30) that the instant case provides an "ideal vehicle" (Pet. 26) for determining what interpretive standard to apply when an Act of Congress is alleged to have abrogated a prior executive agreement. At the time Congress enacted the pertinent appropriations laws, it was well established that the barrier to private suits imposed by the Algiers Accords was separate and distinct from Iran's sovereign immunity under the FSIA. See pp. 9-10, *supra*. Congress nevertheless chose in the appropriations laws only to amend the FSIA to eliminate Iran's immunity from the instant suit, *without* expressly abrogating the executive agreement, granting petitioners a cause of action against the foreign state, or addressing the merits of petitioners' claims in any respect. Accordingly, by far the most natural reading of the amendments to the FSIA made by the relevant appropriations provisions is that they leave undisturbed the independent bar to suit imposed by the Algiers Accords. For that reason, the proper disposition of this case does not depend on the precise degree of clarity that is required for an Act of Congress to abrogate an executive agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

DAVID M. ROEDER, ET AL.,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF

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REPLY BRIEF OF PETITIONER

INTRODUCTION

The petition for certiorari, supported by a brief amici curiae on behalf of a bipartisan group of United States Senators, demonstrates that the court of appeals improperly imposed a "clear statement" requirement with respect to congressional abrogation of unratified executive agreements. The court of appeals' judgment effectively subordinates legislation enacted by Congress and signed by the President to unilateral executive agreements and administrative regulations. As a result, the court of appeals frustrated congressional intent that the Algiers Accords would not bar petitioners' claims against Iran, as evidenced by repeated enactment of appropriations riders during a most unusual process of congressional dialogue with the district court in this very case.

The Government's Brief in Opposition ("BIO") offers a host of irrelevancies and internal contradictions that serve only to underscore the need for certiorari. Indeed, the Government ultimately acknowledges that "an Act of Congress may have the effect of abrogating a prior international agreement even if the agreement is not specifically identified in the text of the superseding statute," (BIO 14) and that, "if the Algiers Accords were shown to conflict with subsequently enacted federal legislation, the provisions of the Act of Congress would supersede those of the executive agreement." BIO 16. Petitioners have met that standard; they have demonstrated that the legislation in this case conflicts with the Algiers Accords by authorizing the federal courts to proceed with claims against Iran arising out of the hostages' ordeal. Even the Government concedes that the federal courts have jurisdiction over such claims, at least to adjudicate challenges to the

validity of the Algiers Accords. BIO 10. As we show in Part 3, *infra*, even that limited grant of jurisdiction is inconsistent with the directive of the Algiers Accords and therefore must be taken as abrogating that executive agreement. Certiorari is therefore urgently needed.

ARGUMENT

1. The Government begins by affirming the authority of the President to settle claims of American nationals through executive agreements. BIO 8-9. That issue is a red herring. This case does not involve the Executive's power, in the abstract, to settle claims. Rather, it involves the Executive's authority to prevent a subsequent Congress from enacting legislation within its proper constitutional domain to abrogate such an executive agreement, through the interposition of a clear statement rule.

2. The Government offers little in the way of analysis to justify imposing a clear statement rule in this context. There is no dispute that the Algiers Accords represent an "exercise of purely executive power" (BIO 11), not subject to any legislative ratification. Similarly, there is no dispute that the legislation in this case lies squarely within Congress's constitutional authority. The enactments do not seek to abrogate state sovereign immunity, otherwise alter the balance of power within our system of federalism, or accomplish any other result so constitutionally problematic as to warrant a clear statement requirement under this Court's precedent. *E.g.*, *Nixon v. Missouri Municipal League*, 124 S. Ct. 1555, 1566 (2004).

The Government's argument to the contrary is premised on cases involving senatorially ratified *treaties*, rather

than unratified *executive agreements*. BIO 13. The Government thus misses the central point of petitioners' argument. For some purposes, it may well be true that an executive agreement serves as a contract between nations, as the Government insists. BIO 14. But for purposes of the American constitutional hierarchy, it is simply fallacious to consider a treaty as equivalent to an unratified executive agreement, just as it would be improper to equate a statute with an administrative regulation. In fact, the analogy is closer than one might realize, for the Algiers Accords are not self-executing and are implemented solely through administrative regulations and executive orders. *See* Exec. Order No. 12283, 46 Fed. Reg. 7927 (1981), codified at 31 C.F.R. § 535.216. In a very real sense, the court of appeals in this case held that these administrative regulations, which this Court has held lack statutory authorization,[1] trumped a superceding Act of Congress.

No court has ever endorsed the Government's unorthodox suggestion, offered for the first time in this Court, that Congress should have to make a clear statement whenever legislation will abrogate an unratified executive order, so "that the President can make a fully informed decision whether to sign or veto [the] bill." BIO 14 n.2. That the Government even offers such a topsy-turvy justification only serves to underscore the serious threat to the separation of powers represented by the D.C. Circuit's judgment.

3. The Government maintains that "there is no basis for construing the recent appropriations laws as abrogating

[1] *See Dames & Moore v. Regan*, 453 U.S. 654, 675 (1981).

the commitment made by the President in the Algiers Accords," BIO 10, principally because the barrier to private suits imposed by the Algiers Accords was supposedly separate and distinct from Iran's sovereign immunity under the FSIA. The Government misses the point. Even if, as a theoretical matter, the FSIA and the Algiers Accords could be read as separate obstacles to petitioners' suit, it does not follow that a single congressional enactment would be unable to abrogate both. Indeed, the Government recognizes that Congress has "removed Iran's sovereign immunity for the acts in question, and thus allowed petitioners to obtain a judicial ruling on their claim that the Algiers Accords were invalid *ab initio*." BIO 10. This concession is fatal to the Government's position for two separate reasons.

A. The Government proposes that the petitioners sue Iran for acts arising out of their ordeal as hostages, seeking as relief "a judicial ruling" against Iran "on their claim" that the Algiers Accords were invalid *ab initio*. BIO 10. Tellingly, the Government uses the term "claim" in describing the action that petitioners may bring against Iran (whose sovereign immunity the Government concedes has been eliminated by congressional action). BIO 10. Yet the Algiers Accords purport to bar any and all "claims" against Iran. The Accords are not limited to claims for money damages. The Accords, 20 I.L.M. 223, 227 (1981), state in relevant part:

> [t]he United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events

occurring before the date of this declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran.

The implementing regulation states in relevant part:

1-101. The Secretary of the Treasury shall promulgate regulations: (a) prohibiting any person subject to U.S. jurisdiction from prosecuting in any court within the United States or elsewhere any claim against the Government of Iran arising out of events occurring before the date of this Order relating to (1) the seizure of the hostages on November 4, 1979, (2) their subsequent detention, (3) injury to United States property or property of United States nationals within the United States Embassy compound in Tehran after November 3, 1979, or (4) injury to United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran . . .

1-102. The Attorney General of the United States is authorized and directed, immediately upon the issuance of regulations in accordance with Section 1-101, to take all appropriate measures to notify all appropriate courts of the existence of this Order and implementing regulations and the resulting termination of litigation.

A Treasury regulation prohibited the hostages "from prosecuting in any court within the United States . . . any claim against the Government of Iran." 31 C.F.R. § 535.216(a).

In its brief in the district court, the Government made clear that the Algiers Accords barred any judicial proceedings relating to the hostages' claims – not simply the award of money damages:

> The legal duty of the United States in this matter is not simply to relieve Iran from any judgment that might be entered in this case, but above and beyond that to "*preclude the prosecution* against Iran" of plaintiffs' claims. General Declaration, ¶ 11 (emphasis added). Hence, even short of entering a final judgment against Iran, any proceedings that have been or may be held in this Court that are directed toward that goal, including the scheduled hearing on damages, are in contravention of the United States' responsibilities under the Algiers Accords and, for that matter, federal law.[2]

Quite obviously, by authorizing the federal courts to exercise jurisdiction to adjudicate certain "claims" against Iran, Congress has taken an action which conflicts with the Algiers Accords. It has therefore abrogated the Accords, even under the Government's own argument that the appropriations riders simply removed Iran's sovereign immunity.

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[2] Ct. App. JA 37-38, Memorandum of Points and Authorities in Support of the United States' Emergency Motion To Intervene, and to Adjourn Hearing on Plaintiffs' Damages Pending Decision on the United States' Motion to Dismiss 20-21 (filed 10/12/01).

B. Moreover, it is evident that Congress meant to do much more than simply remove Iran's immunity from a suit testing the validity of the Algiers Accords *ab initio*. After all, this Court had already upheld the settlement of claims accomplished in the Algiers Accords as a permissible exercise of executive authority. *Dames & Moore v. Regan*, 453 U.S. 654, 686, 688 (1981). The Government's interpretation of the appropriations Acts would therefore render them an empty gesture – an opportunity for the petitioners to file suit, only for the purpose of having the district court pronounce the petitioners' claims extinguished two decades ago by an unratified executive agreement. The Government would interpret Congress's handiwork as "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring). Such an interpretation is foreclosed by the well-accepted canon that the legislature must not be presumed to do a futile thing. *E.g.*, *EEOC v. Commercial Prods. Co.*, 486 U.S. 107, 120-21 (1988).

Nor is it tenable to suppose that Congress was simply trying to clarify "the locus of responsibility for the dismissal of petitioners' claims." BIO 11. The nature of the Algiers Accords as an unratified executive agreement was already abundantly clear. No one has ever confused it with a treaty. And it is most unlikely that Congress would have repeatedly enacted appropriations riders to send any such message, which it could have accomplished far more simply through a non-binding resolution or by speeches on the legislative floor.

C. The Government's interpretation of the appropriations riders is further undermined by the D.C. Circuit's subsequent decision in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004). The issue is not a matter of reconciling two decisions by the same circuit, as the Government claims. BIO 16 n.5. Rather, the issue is the abrogation of the Algiers Accords. *Cicippio-Puleo* held that the Flatow Amendment creates a federal cause of action for victims of terrorism against individual officials, employees, and agents of foreign states that sponsor terrorism (including Iran), and that foreign state sponsors of terrorism will be amenable to suits in United States courts under state-law causes of action (such as those asserted by petitioners in this case) for assault, battery, false imprisonment, and the like. The D.C. Circuit remanded the *Cicippio-Puleo* case "to allow plaintiffs an opportunity to amend their complaint to state a cause of action under some other source of law, including state law. . . ." *Id.* at 1036.

Accordingly, the Flatow Amendment now provides plaintiffs with the opportunity to bring a federal cause of action for damages against individual officials, employees, and agents of Iran – with the untested opportunity to seek to hold Iran itself vicariously liable under respondent superior and other principles. The D.C. Circuit's own construction of the Flatow Amendment confirms that Congress has indeed abrogated the Algiers Accords.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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ISLAMIC REPUBLIC OF IRAN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF SENATORS GEORGE ALLEN, TOM HARKIN, ERNEST F. HOLLINGS AND RICHARD C. SHELBY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Statement of Facts

Senators George Allen, Tom Harkin, Ernest F. Hollings and Richard C. Shelby (Collectively "The Senators"), by and through counsel and pursuant to Rule 37.3(b), hereby file their Motion for Leave to file *Amicus Curiae* Brief in this case. In support of their motion, amici make the following showing:

Pursuant to Rule 37(a), by letter dated March 30, 2004, amici sought written consent from Counsel of Record for Petitioner and Respondent. Petitioner's Counsel and Counsel for the Respondent the United States of America granted consent. Consent from the Islamic Republic of Iran has not been granted. The Senators' brief is being filed timely.

Nature of Interest

As members of the United States Senate, amici have a strong interest in the preservation of the Constitution's "single, finely wrought and exhaustively considered, procedure" for making laws. *INS v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 2784 (1983). In this action, the District of Columbia Court of Appeals applied a "clear statement" rule in determining whether a Law passed by Congress and signed by the President abrogated an unratified executive agreement. This test raises separation of powers issues and creates a check on Congress' legislative powers not delegated by the Constitution. Accordingly, the outcome of this case will have a direct impact on the Senators.

The Senators respectfully submit that their Motion For Leave to File Amicus Curiae Brief should be granted.

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QUESTIONS PRESENTED

1. Does the "clear statement" rule for the abrogation of an unratified executive agreement violate the separation of powers doctrine?

2. Does the application of the "clear statement" rule frustrate Congress' clearly expressed intent to allow this suit to proceed?

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INTERESTS OF AMICI CURIAE[1]

The United States Constitution vests legislative responsibility in a bicameral Congress and requires that laws passed by Congress and signed by the President are the supreme law of the land. A judicially created test requiring Congress to expressly address the hundreds of unratified executive agreements before passing a comprehensive law upsets this careful allocation of authority by granting the President an ability to limit the scope of legislation beyond that delegated by the Constitution. As members of the United States Senate, amici have a strong interest in the preservation of the Constitution's "single, finely wrought and exhaustively considered, procedure" for making laws. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

STATEMENT OF THE FACTS

The Islamic Republic of Iran is a terrorist state that in 1979 kidnapped and tortured American citizens for 444 days. The United States Congress has repeatedly expressed the desire to allow suits against the Islamic Republic of Iran for its sponsorship of terrorism and for committing these egregious acts.

[1] A Motion to File an Amicus Brief is being filed simultaneously with this brief. The Office of the Solicitor General has consented to the filing of this brief by letter dated April 2, 2003. Consent for amicus briefs has not been obtained from the Islamic Republic of Iran. Counsel for Petitioners provided a copy of their Petition to Amici Curiae. No other person or entity authored this brief in whole or in part and no person or entity other than the Amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Congress expressed this desire on at least four occasions. First, Congress passed the Antiterrorism Act in 1996 waiving sovereign immunity for terrorist acts sponsored by countries on the U.S. State Department's list of state sponsors of terrorism. Pub. L. No. 104-132 (codified at 28 U.S.C. § 1605(a)(7)) (Iran has appeared on the State Department's list since 1984). *Roeder v. Islamic Republic of Iran*, 195 F.Supp.2d 140, 160 (D.D.C. 2002). Second, the Flatow Amendment, named for a suit against the Islamic Republic of Iran, was passed in 1998 to provide redress for those victimized by Iran. *See* Antiterrorism Act at § 1605(e)(7); *See Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1 (D.D.C. 1999); *See also Cronin v. Islamic Republic of Iran*, 238 F.Supp.2d 222, 231 (D.D.C. 2002). In November 2001, Congress acted a third time and amended the Foreign Sovereign Immunity Act ("FSIA") to allow this specific suit to go forward, following at the District Court the United States' attempt to vacate the judgment on liability in favor of Plaintiffs. *See* H.R. 2500, 107th Cong., 1st Sess., the 2002 Appropriations Act for the Departments of Commerce, Justice, and State, the Judiciary. Pub. L. No. 107-77, 115 Stat. 748 (2001). In December 2001, not satisfied with these expressions alone, Congress acted a fourth time and amended a technical error in citing this suit's civil action number. *See* Department of Defense and Emergency Supplemental Appropriations Act, Pub. L. No. 107-117, 115 Stat. 2230 (amending Pub. L. No. 107-77 by striking '1:00CV03110 (ESG)' and inserting '1:00CV03110 (EGS)'). Despite these repeated and specific expressions by Congress, the United States Court of Appeals for the District of Columbia Circuit held that the suit was barred because Congress failed to expressly renounce the Algiers Accords, an unratified executive agreement signed by President

Carter in 1979 preventing suits against Iran arising from the hostage crises.

SUMMARY OF ARGUMENT

1. The Court of Appeals' application of the "clear statement" rule in this context frustrates the purpose behind separating the powers of government in the Constitution. Under the D.C. Circuit's unprecedented test, an executive agreement limits the field upon which Congress can legislate unless Congress expressly recites an intention to abdicate each individual executive agreement. This power goes beyond the Executive's Constitutional role and violates the intricate balance of power intended by the Founding Fathers.

2. Congress specifically acted in 2001 on two occasions with the intent of allowing this suit to go forward in order to compensate the victims of the Islamic Republic of Iran's terrorism. The specificity of the Amendments passed by Congress and their accompanying legislative history clearly reflect this intent. Despite this clear intent, the Court of Appeals wrongly gave a restrictive interpretation of this legislation leading to an unreasonable result not in accord with Congressional intent.

ARGUMENT

I. APPLICATION OF THE CLEAR STATEMENT RULE IN THIS CONTEXT VIOLATES THE SEPARATION OF POWERS DOCTRINE

The separation of powers in our government is a "sacred" principle that was deliberately implemented into the Constitution by the Founding Fathers. *Myers v. U.S.*, 272 U.S. 52, 116 (1926) *quoting* James Madison, 1 Annals of Congress, 581. A judicially created test which permits the Executive to unilaterally limit the authority of Congress to legislate is a serious erosion of Congressional authority and a distortion of the "sacred" balance enshrined in our Constitution.

The Court of Appeals below erroneously applied a "clear statement" rule in determining whether acts of Congress abrogated an unratified executive agreement. Under the "clear statement" rule adopted by the D.C. Court; a law passed by Congress and signed by the President can not abrogate an earlier executive action unless Congress clearly expresses the intention to overrule the executive action. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978). The rationale for this rule flows from the canon of disfavoring repeals by implication, and such a canon is properly invoked when dealing with subsequent enacted Treaties or acts of Congress. *See Id.*, 437 U.S. at 190 (applying clear statement rule when analyzing two acts of Congress); *See also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (comparing a treaty with subsequent enacted legislation).

Application of the "clear statement" rule in examining an unratified executive agreement, however, violates the separation of powers doctrine by allowing the executive

branch to limit the scope and impact of Congress' power to legislate. *See Buckley v. Valeo,* 424 U.S. 1 (1976); *Morrison v. Olson*, 487 U.S. 654, 693 (1988). In effect, unless Congress specifically renounces a given executive agreement, Federal Courts must presume the legislation was not intended to be comprehensive. This limitation is worse than a simple preemption of a field because under this analysis Congress has to affirmatively act in order to avoid the limitation. This check on Congress' power to legislate violates the separation of powers carefully allocated in our Constitution. Congress is the only branch of our government with the power to legislate. The first provision in the Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

U.S. Const. Art. I, § 1. This power is broad and all inclusive. *See* U.S. Const. Art. I, § 9, cl. 18 granting Congress authority:

> [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof.

Significantly, Congress has the power "[t]o regulate Commerce with foreign Nations. . . . " *See* U.S. Const. Art. I, § 8, cl. 3. Congress' power in this field is exclusive and cannot be delegated to another branch. *Touby v. U.S.*, 500 U.S. 160, 165 (1991). Nor can this power be unilaterally usurped by another branch. *See Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 273 (1991).

Congress should not be "required to investigate the array of international agreements that arguably provide some protection that it wishes to annul and then assemble a check-list reciting each one." *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 124 (2nd Cir. 2000). The United States literally has hundreds of unratified executive agreements in effect. *See* Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on Jan. 1, 2003 (compiled by Office of Legal Advisor, U.S. Department of State). These agreements touch on an incredibly wide variety of issues from the biological control of the Aedus Aegyph-mosquito in Brazil to regulation of satellite transmissions. *Id.* Executive agreements exist both with foreign states as well as trade organizations like The Group of Eight and the World Trade Association. *Id.* With increasing prevalence, these agreements address matters of domestic importance, and the majority impact commerce with foreign nations – an area of legislative prerogative.[2] These are clearly areas where the Founding Fathers said Congress had the final say. U.S. Const. Art. I.[3]

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[2] Under the D.C. Circuit's interpretation an agreement negotiated by a functionary at the World Trade Organization and another functionary in the executive branch would trump an act of Congress. Surely this was not the intent of the founding fathers.

[3] Significantly, Amici Curiae do not maintain that the executive can not enter into an agreement with a trade association or another country without Congressional approval. Instead, Amici Curiae simply maintain that an executive agreement that has not been ratified by the Legislature should not later be interpreted as a check on Congress' powers.

The "clear statement" rule when properly restricted to treaties and laws does not violate the separation of powers doctrine because *both* of these items receive legislative approval. Before becoming law, an act of Congress requires, at a minimum, approval by a majority of both the House of Representatives and the Senate. Likewise, a treaty requires the advice and consent of a super majority vote in the Senate. U.S. Const. Art. II, § 2, cl. 2. An executive agreement on the other hand receives no review and does not go through either door of Congress. Such an agreement neither originates in either house of Congress, nor is presented to Congress for its review. This Court has held that the requisites of bicameralism and presentment are unwaivable. *Chadha*, 462 U.S. at 458. This absence of Congressional review necessarily requires that an unratified executive agreement be treated with less deference.[4]

Legislative review and approval gives further credibility to Treaties and Laws and ensures a democratic imprimatur of their terms. This process allows for vast constituencies to participate in an open debate on the merits of a particular item, as opposed to an executive agreement which is normally passed in non-public meetings. *See* Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 Cal. L. Rev. 671, 723-724 (1998) ("Senate proceedings are open and public, whereas the process of foreign policy-making by the executive is generally secret."). As James Madison observed in The Federalist No. 49, Congress is uniquely

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[4] The silent approval of executive action relied upon in *Dames & Moore v. Regan*, 453 U.S. 654, 685 (1981) is not present in this case. Congress has repeatedly voiced its opinion on this matter.

positioned to best serve and represent the American people in this debate because:

> The members of the legislature, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connexions of blood, of friendship, and of acquaintance, embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are most immediately the confidential guardians of their rights and liberties.

The Federalist No. 49 (James Madison).

The Founding Fathers clearly recognized Congress' unique position in facilitating a national debate and structured the Constitution to allow for this review. *See Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("[T]his system of division and separation of powers" was "deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power." (internal citations omitted)). By treating an executive agreement as the equivalent of a treaty or a law and applying the "clear statement" rule in this context, the Court of Appeals allows the executive branch to circumvent this important debate and limit the scope of Congress' powers.[5]

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[5] The plain language of the Supremacy Clause demonstrates that executive agreements should be treated as an inferior source of authority in comparison to treaties and laws:

(Continued on following page)

Furthermore, this Executive check on the breadth of Congress' legislative powers robs the American people of a fundamental protection of liberty. As stated by Justice Kennedy's concurrence in *Clinton v. City of New York*:

> Liberty is always at stake when one or more of the branches seek to transgress the separation of powers. Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.

524 U.S. 417, 450 (1998). This principle is equally emphasized in the Federalist papers:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced as the very definition of tyranny. . . . [T]he preservation of liberty requires, that the three great departments of power should be separate and distinct.

The Federalist No. 47 (James Madison).

> It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and completely administered

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> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .

U.S. Const. Art. VI. This reading is supported by the use of the terms agreements and compacts elsewhere in the text. *See e.g.*, U.S. Const. Art. I, § 10.

> by either of the other departments. It is equally evident, that neither of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.

The Federalist No. 48 (James Madison). The Court of Appeals' application of the "clear statement" rule in this context makes Madison's fear of one branch exerting an overruling influence over another's administration of powers a reality.

Accordingly, the "clear statement" rule is an inappropriate test in evaluating whether an act of Congress signed into law by the President trumps an unratified executive agreement. Such a burden on Congress gives the President the ability to limit Congress' constitutionally endowed legislative powers, and violates the separation of powers doctrine.

II. CONGRESS CLEARLY EXPRESSED THE INTENT TO ALLOW THIS SUIT NOTWITHSTANDING ANY OTHER AUTHORITY INCLUDING THE ALGIERS ACCORDS

Congress clearly intended for the 2001 amendments to allow this particular suit to proceed notwithstanding the Algiers Accords. The November 2001 Amendment clarified that the Islamic Republic of Iran's sovereign immunity was abrogated by specifically referencing this suit's civil action number. See H.R. Conf. Rep. No. 278, 107th Cong., 1st Sess. At 170. Within two months, Congress again articulated its position by the Amendment in December 2001. The Joint Explanatory Statement provided with the December Amendment states:

> **[N]otwithstanding any other authority**, the American citizens who were taken hostage by the Islamic Republic of Iran in 1979 have a claim against Iran under the Antiterrorism Act of 1996 and the provision specifically allows the judgment to stand for purposes of award damages. . . .

H.R. Conf. Rep. No. 107-350 at 422-423 (emphasis added). Clearly, these Amendments evidence an intent by Congress to allow Plaintiffs, as victims of terror, to receive compensation from the Islamic Republic of Iran "notwithstanding any other authority."

The Amendments were added to the text of the antiterrorism provisions of the FSIA and accordingly should be interpreted to be consistent with their intended purpose. *See Holloway v. U.S.*, 526 U.S. 1 (1999) (statute should be interpreted in consonance with the provisions of the whole law). Congress' intent of allowing this suit to proceed is consistent with the dual purposes behind the 1996 Antiterrorism and Effective Death Penalty Act Amendments to the FSIA of punishing countries that sponsor terrorism and providing compensation to their victims. *See* Allison Taylor, *Another Front in the War on Terrorism? Problems with Recent Changes to the FSIA*, 45 Ariz. L. Rev. 533, 534 (2003). When the 2001 Amendments are viewed in light of this intent, it becomes clear that the 2001 Amendments should be interpreted as intending to allow this suit, notwithstanding any other authority – including the Algiers Accords. The interpretation proffered by the Court of Appeals that Congress intended only to waive sovereign immunity subject to the Algiers Accords has no basis in fact and is, quite simply, wrong. *See, e.g., Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)

(statutes should not be interpreted in a manner leading to an unreasonable result inconsistent with the spirit and intention of its makers).

CONCLUSION

Under the Constitution, there are only two permissible checks on Congress' legislative powers. First, the Executive is given a veto power by which it may remand a bill to Congress for further review. The second check is inherent in the Supreme Court which may review a law and determine its constitutionality. Application of the "clear statement" rule in this context creates a new and third check on Congress' legislative powers by granting the Executive the ability to limit the effect of a duly enacted law through executive agreements. This third check was not contemplated by the Framers and represents an unjustified restraint on Congressional power.

Action by the Court is needed now and not later, because application of the "clear statement" rule in this context would: (1) unreasonably restrain Congress in creating laws, in derogation of the separation of powers doctrine; and (2) frustrate Congress' intent to allow this suit against the Islamic Republic of Iran. Unless the Court grants the petition and declares this test unconstitutional, Congress will be unable to exercise its Constitutional role.

Therefore, the Court should address the constitutionality of this test at this time.

Respectfully submitted,

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